Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case squarely addresses a question left open by this Court in *NLRB v. Town & Country Electric Inc.*, 516 U.S. 85, 116 S. Ct. 933, 133 L. Ed. 2d 371 (1995).

Must an employer, without limitation, welcome into its workplace a union agent who is actively engaged in economic warfare against that employer? In this case, a sharply divided en banc court has announced that an employer must allow an admitted union agent to freely roam through that employer's plant in the midst of a bitter strike and boycott campaign. The decision below ignores the blatant conflict of interest that is inherent when a union agent seeks to enter a workplace during an ongoing labor dispute.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, counsel for Petitioner certifies that Diamond Walnut Growers, Inc. is a cooperative of walnut growers with no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

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Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Diamond Walnut Growers Inc. v. National Labor Relations Board.*

OPINIONS BELOW

The en banc opinion of the Court of Appeals is reported at 113 F.3d 1259 (D.C. Cir. 1997), and is reproduced in Appendix B, *infra*, 7a through 66a. The en banc opinion reverses in part and upholds in part the opinion of a three judge panel and a decision and order of the National Labor Relations Board. The opinion of the three judge panel of the Court of Appeals is reported at 80 F.3d 485 (D.C. Cir. 1996) and is reproduced in Appendix E, *infra,* 71a through 107a. The decision and order of the National Labor Relations Board is reported at 316 N.L.R.B. 36 (1995) and is reproduced in Appendix F, *infra,* 108a through 163a.

STATEMENT OF JURISDICTION

A Petition for Review of the Decision and Order of the National Labor Relations Board was brought before the Court of Appeals for the District of Columbia Circuit pursuant to section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). The Decision and Order of the National Labor Relations Board was a final and appealable order disposing of all administrative agency claims with respect to all parties on the issues encompassed by the unfair labor practice charges. *Diamond Walnut Growers, Inc.*, 316 N.L.R.B. 36 (1995); Appendix F, *infra,* 108a through 163a. Judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 11, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act ("Act") are as follows:

> 29 U.S.C. § 157 — Right of employees as to organization, collective bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> 29 U.S.C. § 158, Unfair Labor Practices — (a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, coerce employees in the exercise of the rights guaranteed in section 157 of this title; (3) by discrimination in regard to hire or tenure of employment to encourage or discourage.

STATEMENT OF THE CASE

Diamond is a walnut-processing facility located in Stockton, California. Diamond's production employees have been represented by Teamsters Local 601 (hereinafter "Union") since 1956. After the parties failed to reach a successor agreement to the contract that expired in June 1991, Local 601 struck Diamond without notice on the evening of September 4, 1991 — the inception of the walnut-harvesting season. Faced with the

prospect of losing an entire season's crop, Diamond hired replacement workers to handle the perishable walnuts. Since 1991, replacement workers at Diamond have continued to process the walnut crop. The strike, which continues to this day, has been marred by violence and a widely publicized international Union boycott campaign.

In mid-1992, with the anniversary of the strike approaching, the Union filed a petition with the NLRB, in order to determine whether it still represented the employees. The petition led to a first election in 1992, in which employees resoundingly rejected continued Union representation, by a margin of 226 votes. Thereafter, based on Union objections, the parties agreed to rerun the election in 1993.

In 1993, as part of the Union's international boycott campaign, a group of strikers and Union officials undertook a cross-country bus tour urging a nationwide Diamond boycott. The Union distributed leaflets alleging that Diamond brand walnuts were "unsafe" and, due to lax inspection by "inexperienced" replacement workers, contaminated with "mold, dirt, oil, worms and debris." In addition, Diamond's customers and the Department of Health and Human Services received a letter alleging that Diamond's replacement workforce was made up of "drug addicts, drug dealers, alcoholics and even prostitutes" with "AIDS virus, Sifillis [sic], Gonorrea [sic], Hepatitis and other contagious diseases."[1]

While the strike and boycott continued at full force, in the weeks preceding the second election the Union implemented a unique campaign strategy. Several pre-strike employees — found by the NLRB to be Union agents — crossed the picket

1. The letter was signed by the "Original and United Workers of Diamond Workers" and included a reference to "us, the striker's of Diamond Walnut."

line to resume jobs within the plant. A Teamsters International official escorted the Union agents to the plant gates, and demanded that they be employed. Their entry into the plant was preceded by a letter from the Union's attorney, instructing Diamond to communicate with the Union directly about any issues involving the Union agents' employment. The Union's letter, as well as statements made by Union officials to local media, made it clear that the agents were crossing the picket line solely to observe management's conduct and to campaign on behalf of the Union.

This provocative strategy, orchestrated by the Union, caused concern amongst Diamond's managers. Diamond believed that partisan Union agents, who for two years had disparaged the Diamond brand and urged a consumer boycott of Diamond products, posed an imminent danger to the product and the plant. In addition, because of the highly publicized nature of the return to work and ongoing strike, Diamond believed that there was a serious risk of confrontation between the known Union agents and the replacement employees they had ridiculed as disease-ridden and inept.

Nonetheless, Diamond management chose to accommodate the Union agents. Diamond placed them into positions inside the plant. However, it assigned them to positions that created the least risk of sabotage and confrontation. Consistent with the Union's strategy, the agents did not remain inside the plant for long. All of them quit on the day of the election, after working no more than two weeks.

When the ballots in the second election were counted, a tally issued showing 575 votes against the Union and 475 votes for the Union. Subsequently, the Union filed objections and related unfair labor practice charges. One of the issues raised was whether Diamond had violated sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1), (3) by assigning three of the

returning Union agents, Willa Miller, Alfonsina Muñoz and Mohammad Kussair, to specific low risk jobs. A hearing was held before an NLRB administrative law judge, who recommended dismissal of all of the Union's objections and unfair labor practice charges.

The NLRB disagreed. The Board found that Diamond had violated the Act by failing to place Miller, Muñoz and Kussair in the positions of quality control assistant, lift truck operator and loader respectively. The Board reasoned that under its holding in *Rose Printing*, 304 N.L.R.B. 1076 (1991), Diamond was obligated to treat the Union agents in a nondiscriminatory manner just like any other employee. The Board concluded that Diamond could not take into account the fact that the Union agents returned to work in the midst of an ongoing strike and product disparagement campaign.

In reaching this conclusion, the Board rejected Diamond's argument, based on *NLRB v. Fleetwood Trailer*, 389 U.S. 26 (1967), that the strike and boycott campaign provided a substantial and legitimate business justification for treating the Union agents differently than other strikers. The Board also disagreed with Diamond's assertion that the agents' active participation in the nationwide product disparagement campaign warranted limitations on their access to Diamond's product and equipment.

Relying on *Fleetwood*, a panel majority of the D.C. Circuit overturned the Board's decision and order. In applying the *Fleetwood* standard, the panel majority emphasized the predicament Diamond faced when the Union announced that it was sending its people across the picket line. The panel majority had no difficulty in upholding the Board's conclusion that Miller, Muñoz and Kussair were Union agents. The panel rejected, however, the Board's conclusion that Diamond should have ignored the ongoing strike and product disparagement when placing Union agents within the plant.

Instead, the panel concluded that the Union agents posed a significant risk to the plant and the product given the nature of the strike, the boycott allegations, and the replacement workers' animosity toward the strikers and the Union. Citing *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1231 (1992), a companion case to *Town & Country Electric* before the NLRB, the Court noted that a strike is a special circumstance, and that during a strike an employer is free to take certain steps to protect its business. Accordingly, the panel majority found that Diamond was justified in its placement of Miller, Muñoz and Kussair.

Both the Board and the Union petitioned the Court of Appeals to rehear the case en banc. A sharply divided en banc court reversed in part and upheld in part the panel majority's decision. Three separate opinions were issued, with three judges supporting the panel opinion, four judges supporting the Board's position and two judges (the decisive votes) siding with Diamond on two of the three Union agents and with the Board on the third.[2]

With regard to Union agent Muñoz, Judge Silberman, writing for the court, opined that Diamond had not presented sufficient evidence to establish a risk that Muñoz might engage in sabotage if allowed to work as a forklift operator (her pre-strike job). He stressed that had Muñoz engaged in sabotage, it would have been easily detectable. Similarly, Judge Silberman brushed aside the possibility of Muñoz engaging in product tampering. While noting that the Board was "cryptic" in its treatment of product tampering, Judge Silberman found that Diamond did not distinguish the risk of placing Muñoz in the forklift job from the risk it faced in placing any other returning striker.

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2. All three opinions concurred on one point: that Diamond was justified in its treatment of Union agent Kussair who, like Muñoz, was assigned to work in the growers inspection department.

With regard to Miller, however, Judge Silberman, for the court, reached the opposite conclusion. First, he noted that while all strikes are a form of economic warfare, a union's claim that an employer's food product is tainted is the "strike equivalent of a nuclear bomb." Accepting the fact that a quality control assistant is the person responsible for the final inspection of the product, Judge Silberman found that Miller would be subject to an acute conflict of interest if allowed to work as a quality control assistant. Because of this conflict, Judge Silberman concluded that it was likely that Miller would be "at least inattentive" to her job duties, and that her "inattention" could easily deal Diamond "a crippling blow." The court stressed the fact that there would be no adequate remedy should a defective package of walnuts reach the public through Miller's nonfeasance.

Two separate concurring and dissenting opinions were filed, each of which sharply criticized the Silberman opinion. Chief Judge Edwards and Judges Rogers and Tatel joined Judge Wald in finding that the Board's order should be upheld with respect to both Muñoz and Miller. Judge Wald argued that an employer could never assume, even under strike conditions, that a Union agent has a conflict of interest when that agent enters a workplace. Judge Wald would require specific evidence of misconduct by the Union agent before the employer can attempt to protect itself; to her, *Fleetwood* stands for the proposition that an employer *cannot* have a legitimate and substantial business justification based on fear rather than specific acts. Judge Wald characterized Judge Silberman's opinion as a "remarkable innovation in labor law" that would critically erode employees' rights under the Act.

In marked contrast, Judge Henderson, who was joined by Judge Sentelle and Judge Randolph, found that the Board's decision should be rejected in its entirety. Judge Henderson reasoned that the Board had failed to demonstrate that Diamond's

actions adversely affected employee rights to any extent and thus, the Board had failed to demonstrate a *prima facie* case of discrimination. Even assuming *arguendo*, that the Board had demonstrated a *prima facie* case, Judge Henderson concluded that Diamond had demonstrated substantial and legitimate business reasons for its actions.[3]

REASONS FOR GRANTING THE WRIT

The vehemence and the length of the three opinions from the en banc court are reflective of the vitally important labor law issues raised by this case. Since the *Town and Country* decision, unions have increasingly turned to "salting" — the practice of sending avowed union agents inside non-union workplaces — as a primary organizing technique. The proliferation of "salting" cases makes it imperative that this Court address the question left open in *Town and Country*: when, if ever, can an employer place limitations on Union agents who seek to enter a workplace as employees.

The *Town and Country* court anticipated that this question would need to be addressed. In fact, the Court specifically suggested that there might be situations where the conflict of interest between a union agent and an employer justifies the employer treating the union agent differently. *Town and Country*, 116 S. Ct. at 457. Such a conflict of interest could not be more clearly presented than in this case. There are two independently sufficient reasons why a conflict of interest must be found here. First, Union agents Miller and Muñoz entered the plant under strike conditions. Second, by actively participating in a campaign

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3. Significantly, both dissenting opinions agreed that Judge Silberman's distinction between Miller and Muñoz was unsupported by the record. Thus, seven of the nine judges rejected the cornerstone of the court's ultimate decision — that Miller and Muñoz could be treated disparately.

of product disparagement, the Union agents forfeited their right to be treated like other employees.

There is solid precedential support for each of these propositions. As will be shown below, the Board itself has recognized that strike conditions are not "business as usual," and that a union agent can be treated differently during a strike. *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992). And any employee, including a Union agent, loses the protection of the Act when that employee participates in product disparagement. *NLRB v. Local Union No. 1229 Intern. Brotherhood of Elec. Workers,* 346 U.S. 464 (1953). Under both of these principles, a conflict of interest must be found here.

A. Strike Conditions Create A Conflict Of Interest

Before the Board, *Town and Country* was litigated as a companion case with *Sunland Construction Co., supra.* Both *Town & Country* and *Sunland* involved Union agents applying to work at companies for the purpose of organizing the workforce. In *Town & Country*[4], the Board held that Union agents can fall within the definition of the word employee under the Act. The Board further held that Town and Country's refusal to interview such union agents amounted to unlawful discrimination.

In *Sunland Construction*, the Board echoed its decision with regard to the definition of the word employee. However, the Board readily perceived that *Sunland* differed dramatically from *Town & Country*. In *Sunland*, the Board concluded that the employer had a substantial and legitimate business reason for denying a Union agent's application *because there was an ongoing strike*. The Board found that the strike created an

4. *Town and Country Electric,* 309 N.L.R.B. 1250 (1992).

inherent conflict of interest between the Union agent's goals and those of the employer.

Ultimately, this Court reviewed the Board's decision in *Town & Country*. The holding in *Sunland* was not appealed. In *Town and Country*, the Court upheld the Board's construction of the word employee. However, it specifically left open the question of whether an employer's rejection of Union agents could be justified by a conflict of interest between the agents' loyalties to their union and their duties as employees.

It is noteworthy that in the subsequent disposition of the *Town and Country* case, the conflict of interest question was not adjudicated as a defense for the employer's actions. The Board found the company's rejection of the Union agents unlawful. The Eighth Circuit later held that the company had not raised conflict of interest below as a defense for its refusal to hire the agents. Thus, the court never reached the question of whether any conflict served as a substantial and legitimate business reason for the employer's actions. *Town and Country Electric v. NLRB*, 106 F.3d 816, 821-822 (1996).

Similarly, in *Willmar Elec. Service Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), a case that predated this Court's decision in *Town & Country*, the Court of Appeals for the D.C. Circuit held that Union organizers fall within the Act's definition of the word "employee." Like the Eighth Circuit, however, the D.C. Circuit left open the question as to whether, in certain circumstances, ties to a union can establish such a risk of disloyalty that an employer can reject a Union agent on conflict of interest grounds.

In *Sunland*, the Board provided an answer to this question. The *Sunland* Board acknowledged that an ongoing strike creates an inherent conflict for a union agent. Indeed, the Board and

the courts have long held that the existence of a strike is a special circumstance which often requires a departure from the typical standards that govern relations between union and employer. The most obvious example is an employer's right to permanently replace striking employees. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Under non-strike conditions, wholesale replacement of union members is a gross violation of the Act. However, during a strike the same conduct is entirely lawful.

In *Sunland,* the Board recognized that a strike also warrants different treatment of union agents who seek to enter the struck workplace. The facts of this case illustrate why. Miller and Muñoz were both extremely active in the strike, which was into its third bitter year by the time they entered the plant in 1993. The Union openly sponsored their return; in the local newspaper a Union official analogized them to Daniel entering the lion's den. Miller and Muñoz reported daily to the Union attorney on their campaign efforts inside the plant, as they tried to win over replacement workers to the Union's cause.[5]

Under these circumstances, the fundamental *Sunland* principle — that a strike creates a conflict of interest for a Union agent — should have been dispositive here.[6] Instead, the court below, speaking through Judge Silberman, refused to find that strike conditions, without more, created an inherent conflict of

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5. It is hardly surprising, given these facts, that the administrative law judge and the Board readily found Miller and Muñoz to be Union agents.

6. Judge Silberman contends that Diamond did not cite *Sunland* to the Board. In fact, however, Diamond relied extensively on the principles underlying *Sunland* (while not citing the case itself) in all of its briefs to the administrative law judge and the Board. Moreover, *Sunland* was cited and argued before the Court of Appeals.

interest for Miller and Muñoz. Curiously, the court ultimately found such a conflict in the case of Miller, based on the specific duties of a quality control inspector. Judge Silberman rejected the same argument, however, with regard to placing Muñoz in a forklift driver position. As stated by Judge Henderson, the only difference between the two is that "Miller could have engaged in sabotage through nonfeasance by allowing an inferior product to pass by her while Muñoz would have had to act affirmatively by placing an impurity in the product." This is hardly the kind of distinction on which to rest an important labor law principle.

Essentially, the decision below stands for the proposition that, even during a bitter strike, an employer must allow some union agents free and unsupervised access to its plant. This alarming holding ignores the reality that, during a strike, a union's interest is in hurting the employer's business sufficiently to cause the employer to accede to the union's demands. Given these objectives, a union agent will always be an adversary, even a combatant, during a strike.

And yet, the court's decision would permit an agent such as Muñoz to drive a forklift without limitation into remote areas of a plant where food products are stored, allowing her to handle those products unobserved by a supervisor. To Judge Silberman, these facts do not establish a conflict of interest. The Board's holding in *Sunland*, however, rightly states otherwise: that the inherent conflict of interest created by a strike is enough, by itself, to justify limiting union agents' rights altogether.

The petition herein should be granted for the purpose of resolving whether an ongoing strike creates a conflict of interest for a Union agent who seeks to enter the struck workplace.

B. Product Disparagement Establishes A Conflict Of Interest

There is a second and independent basis on which to find a conflict of interest here. Miller and Muñoz were active participants in a nationwide bus tour, during which they distributed a variety of handbills attacking Diamond's products (as tainted by "mold, dirt, oil, worms and debris") and the "inexperienced" replacement workers who processed them. These attacks sought to destroy the heart of Diamond's business: the confidence of customers in the food products they purchase and consume.

Before the Board and the court below, Diamond consistently asserted that the campaign of product disparagement demonstrated such disloyalty as to permit Diamond to treat the Union agents differently than other employees.[7] Significantly, Miller and Muñoz both sought to return to positions in which they would have unsupervised access to Diamond's food products. Moreover, in either quality control assistant or forklift driver positions, they would be the last, or among the last, persons to see the product before it left the plant. Under these circumstances, a conflict of interest clearly existed.

In *NLRB v. Local Union No. 1229 Intern. Broth. of Elec. Workers*, *supra*, also known as the *Jefferson Standard Broadcasting* case, the Supreme Court ruled that an employer had cause for discharging disloyal employees who had distributed handbills criticizing the quality of the employer's programming. The Court held that striking employees owe a duty not to disparage the product and services of their employer. The Court stated that "there is no more elemental cause for

7. Contrary to Judge Silberman's observation, Diamond strenuously contended below that the product disparagement campaign was not protected activity under the Act.

discharge of an employee than disloyalty to his employer." *Id.* at 472.

In *Coca-Cola Bottling Works*, 186 N.L.R.B. 1050 (1970), the Board was faced with facts remarkably similar to those at issue here. In that case, striking employees had distributed leaflets to the general public entitled "Health Warning."

> The leaflets advised the public to beware; that empty Coca Cola bottles often serve as collector of foreign matter; and due to the fact that the regular employees are on strike, the product is being inspected by stopgap employees who do not have the same level of experience as the regular employees.

Id. at 1054.

The Board upheld the administrative law judge's finding that this leaflet was not protected activity. The Board found that the main thrust of the leaflet was to create fear in the public's mind and that it constituted disparagement of the quality of the employer's product. *Id.*

The leaflets distributed by the Diamond strikers are almost identical in content to those at issue in *Coca-Cola*. Both disparage the employer's product by suggesting that replacement employees are producing items that are contaminated by foreign objects. The only difference is that in *Coca Cola*, the strikers asserted that the bottles were contaminated by roaches, ants, flies, bugs and dead mice, while here, the strikers claim that the walnuts are contaminated by mold, insects, oil, dirt and debris. 186 N.L.R.B. at 1063. Clearly, in both cases the leaflets are unprotected by the Act.

It is not necessary here to determine whether the campaign

of product disparagement by Miller, Muñoz and their fellow Union members was sufficient to warrant discharge. Rather, this case presents the question of whether the product disparagement demonstrated a conflict of interest sufficient to deny the two Union agents unlimited and unsupervised access to the Employer's food products.

Even Judge Silberman's opinion recognizes that "when a union claims that a food product produced by a struck company is actually tainted it can be thought to be using the strike equivalent of a nuclear bomb." Having repeatedly asserted that Diamond's product was tainted, Miller and Muñoz had every reason to make their claims come true when they entered the plant in the heat of the ongoing strike. These circumstances created the plainest possible conflict of interest.

In *Town and Country*, the court left open the question of whether, and when, a conflict of interest might justify differential treatment of Union agents. This case will allow the Court to resolve this important question. Diamond submits that the ongoing strike, and the campaign of product disparagement, created inherent conflicts of interest for Union agents Miller and Muñoz. It is difficult to imagine a better record on which to resolve this important labor law issue.

CONCLUSION

For the above reasons, Diamond respectfully urges that its petition be granted.

Respectfully submitted,

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED SEPTEMBER 11, 1997

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1996

No. 95-1075

Diamond Walnut Growers, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Cannery Workers, Processors, Warehousemen and Helpers, Local 601 and International Brotherhood Of Teamsters,

Intervenors

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the proposed judgments submitted by petitioner and respondent, it is

Appendix A

ORDERED that the proposed judgment submitted by respondent is hereby adopted as the judgment of the court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Silberman is attached.

Circuit Judges Sentelle and Henderson would adopt petitioner's proposed judgment.

Circuit Judge Garland did not participate in this matter.

Silberman, *Circuit Judge*: Petitioner's objection to the Board's proposed judgment as it relates to an offer of reinstatement to Munoz might have been meritorious had the propriety of this aspect of the Board's order been raised before the Board and in petitioner's briefs before us.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1075

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CANNERY WORKERS, PROCESSORS, WAREHOUSEMEN AND HELPERS, LOCAL 601 AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Intervenors.

JUDGMENT

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND,* Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Diamond Walnut Growers, Inc., to review an order of the

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* Circuit Judge Garland did not participate in this decision.

Appendix A

National Labor Relations Board in Board Case Nos. 32-CA-13479 and 32-RC-3553, issued on January 20, 1995, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 29, 1997, and has considered the briefs and transcript of record filed in this cause. On May 20, 1997, the Court, being fully advised in the premises, handed down its decision in which it enforced in part, and denied in part the Order of the Board. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Diamond Walnut Growers, Inc., Stockton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to offer Alfonsina Margaret Munoz reinstatement to the seasonal position of lift truckdriver because of her union status or her union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Munoz immediate and full reinstatement to the seasonal position listed above and make her whole for the loss of earnings and benefits she has suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the Board's Decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of this Judgment.

(c) Post at its facility and place of business in Stockton, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32 of the National Labor Relations Board (Oakland, California), after being duly signed by the authorized representative, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply.

IT IS FURTHER ORDERED that the parties shall bear their own costs.

s/ illegible
Chief Judge, United States
Court of Appeals for the
District of Columbia Circuit

Appendix A

APPENDIX

NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to offer Alfonsina Margaret Munoz reinstatement to the position of lift truckdriver because of her union status or her union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Munoz reinstatement to the seasonal position listed above and WE WILL make her whole, with interest, for the loss of earnings and benefits she has suffered as a result of the discrimination against her.

DIAMOND WALNUT GROWERS, INC.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED MAY 20, 1997

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

Cannery Workers, Processors, Warehousemen and Helpers, Local 601 and International Brotherhood of Teamsters, AFL-CIO,

Intervenors.

No. 95-1075.

United States Court of Appeals,
District of Columbia Circuit.

Argued En Banc Jan. 29, 1997.

Decided May 20, 1997.

* * *

Before EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND,* Circuit Judges.

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* Circuit Judge Garland did not participate in this decision.

Appendix B

Opinion for the Court filed by Circuit Judge SILBERMAN.

Opinion concurring in part and dissenting in part filed by Circuit Judge WALD, with whom Chief Judge EDWARDS and Circuit Judge ROGERS and Circuit Judge TATEL join.

Opinion concurring in part and dissenting in part filed by Circuit Judge HENDERSON, with whom Circuit Judge SENTELLE and Circuit Judge RANDOLPH join.

SILBERMAN, Circuit Judge:

Diamond Walnut Growers, Inc. petitions for review of a National Labor Relations Board order holding that it committed an unfair labor practice in its placement of three returning strikers. We grant the petition for review in part and in part grant the NLRB's cross-application for enforcement.

I.

Diamond Walnut processes and packages walnuts for national and international distribution. The company operates with a year-round workforce, supplemented by additional seasonal hires during the fall harvesting season. Diamond's employees have for years been represented by Cannery Workers, Processors, Warehousemen and Helpers Local 601 of the International Brotherhood of Teamsters, AFL-CIO (the union). In September of 1991, following expiration of the most recent collective bargaining agreement between Diamond and the union, nearly 500 of Diamond's permanent and seasonal employees went on strike. Diamond hired replacement workers to allow it to continue operations.

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By all accounts, the strike was, and remains, a bitter affair. The strikers are alleged to have engaged in various acts of violence against the replacement workers, especially at the outset of the strike, and restraining orders issued against both strikers and replacements. *See generally Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 1993 WL 356124 (1993). In addition, as part of its effort to exert economic pressure on Diamond, the union undertook an international boycott of its product. The boycott included a well-publicized national bus tour during which union members distributed to the public leaflets which described Diamond's workforce as composed of "scabs" who packaged walnuts contaminated with "mold, dirt, oil, worms and debris."

Approximately one year into the strike, the Board held a representation election. The union lost the election, but its objections prompted the Board to order a rerun to be held in October of 1993. Just over two weeks prior to the new election, a group of four striking employees, represented by a union official, approached Diamond with an unconditional offer to return to work. According to the letter presented to the company at that time by their representative, the employees were convinced that "a fair election [was] simply impossible." Nonetheless, the employees "fe[lt] that it [was] important that the replacement workers . . . have an opportunity to hear from Union sympathizers." Thus, the group of strikers was "available and willing to return to immediate active employment." The following day, the union notified Diamond that pursuant to the above-quoted letter, two additional strikers were willing to return to work.

It is undisputed that for three of the returning strikers, neither the permanent jobs they held before the strike, nor substantially equivalent ones, were available at the time of their

return. Diamond placed these three in various seasonal jobs, and it is these placements which led to the order under review. Prior to the strike, Willa Miller was a quality control supervisor; she was placed in a seasonal packing position even though a seasonal inspection job was available. Alfonsina Munoz had been employed as a lift truck operator and, despite the availability of a seasonal forklift job, was given a seasonal job cracking and inspecting nuts in the growers' inspection department at the front end of the production process. Mohammed Kussair, formerly an air separator machine operator, was, like Munoz, placed in a seasonal cracking and inspecting position in the growers' inspection department. Neither Miller nor Munoz complained to Diamond about their job placements. Kussair asked to be transferred to a loader position for which he was qualified after receiving three oral reprimands for failing to meet his daily quota, the third of which led to a written reprimand. Diamond sought to accommodate Kussair's transfer request, but he left to rejoin the strike before it could do so.

The rerun election took place as scheduled, and the union lost. Following that election, the General Counsel filed a complaint alleging that Diamond had violated sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(3), (a)(1) (1994),[1] by unlawfully discriminating

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1. Section 8(a)(3) forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]. . . ." *Id.* § 158(a)(1). Section 7, in relevant part, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

against Miller, Munoz, and Kussair. The General Counsel alleged that because of their protected activity, Diamond declined to put them in certain available seasonal positions for which they were qualified and that were preferable to the positions in which they were actually placed. After a hearing, an administrative law judge recommended that the charges be dismissed. He found that Diamond had "discriminated" insofar as it had placed the employees at least in part because of their protected activity, but he did not think that discrimination "unlawful" under the Board's decision in *Rose Printing Co.*, 304 N.L.R.B. 1076, 1991 WL 197152 (1991), which held that an employer's "obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs." *Id.* at 1076. The ALJ also recommended that if the Board should reverse him and find that Diamond did discriminate against the returning strikers within the meaning of the Act, it should conclude that it committed an unfair labor practice, since Diamond "failed to establish legitimate and substantial business justifications for placing the returning strikers in the jobs to which they were assigned."

The Board reversed. It thought the ALJ had overlooked the statement in *Rose Printing* to the effect that returning strikers who had no right to reinstatement (because of the unavailability of their former jobs or substantially equivalent ones) were nevertheless "entitled to nondiscriminatory treatment in their applications for other jobs." *Rose Printing*, 304 N.L.R.B. at 1078. As the Board put it, "although [Diamond] was under no legal obligation . . . to reinstate the strikers . . ., once it voluntarily decided to reinstate them, it was required to act in a nondiscriminatory fashion toward the strikers." Diamond had discriminated against Miller, Munoz, and Kussair, in the Board's

view, by declining "to place them in the [seasonal] positions of quality control assistant, lift truck operator, and loader, respectively, because of their union status and/or because of certain protected union activity they engaged in while on strike." Employing the burden-shifting framework spelled out by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), and *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967), the Board then examined Diamond's asserted justifications for placing the three returning strikers as it did. The Board rejected the contention that the placements were warranted by the employer's concern that the replacement workers might instigate violence against the three and thus justified placement in well-supervised jobs, since "there [was] no evidence that Miller, Munoz, or Kussair were involved" in the strike-related violence allegedly causing Diamond's concern. The Board also dismissed the notion that the placements of Miller and Munoz were justified by their participation in the boycott and the circulation of disparaging leaflets: "[T]he strikers' conduct constituted protected . . . activity and there is no evidence indicating that such protection was lost because of threats made by Miller and Munoz to damage or sabotage [Diamond's] equipment or products." Since Diamond had failed to justify its discrimination, the Board found unfair labor practices, the severity of which, "in light of . . . their timing," warranted setting aside the rerun election.

A divided panel of this court granted Diamond's petition for review and denied the Board's cross-application for enforcement. *Diamond Walnut Growers, Inc. v. NLRB*, 80 F.3d 485 (D.C.Cir.1996). The full court then vacated the panel's judgment and ordered that the case be reheard *en banc*.

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II.

Diamond Walnut challenges the Board's determination that it lacked substantial business justification for refusing to place the three employees in the specific jobs they sought — quality control assistant, lift truck operator, and loader. It is undisputed that the *Fleetwood* framework governs this case. The General Counsel under *Fleetwood* must make out a *prima facie* case that the employer discriminated within the meaning of the Act, which means the employer's decision as to how to treat the three returning strikers was attributable to their protected activity. *Rose Printing* establishes that a struck employer faced with an unconditional offer to return to work is obliged to treat the returning employee like any other applicant for work (unless the employee's former job or its substantial equivalent is available, in which case the employee is preferred to any other applicant). *See* 304 N.L.R.B. at 1078. But Miller and Munoz were not treated like any other applicant for work.[2] Miller was qualified for a seasonal position in quality control that paid 32 cents per hour more than the packing job to which she was assigned. And Munoz was qualified to fill a forklift operating job, a position that paid between $2.75 and $5.00 per hour more

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2. The panel majority concluded that the Board had legitimately determined that petitioner had discriminated against Kussair — by placing him in a lower paying job than a loader — but that this "discrimination" did not discourage union membership (not an argument presented by petitioner). *See* 80 F.3d at 494. Judge Wald, dissenting in part and concurring in part, concluded that no discrimination was shown because the loader job was generally thought undesirable, and as soon as Kussair complained the company attempted to accommodate him, but he went back out on strike before it could. *See id.* at 500-01 (Wald, J., concurring in part and dissenting in part). Since the Board did not seek rehearing as to the panel's *judgment* regarding Kussair, we simply reinstate that judgment.

than the walnut cracking and inspecting job she received. Diamond admits that it took into account Miller's and Munoz's protected activity in choosing to place them in jobs that were objectively less desirable than those for which they were qualified. Petitioner, although it contended that the discrimination was comparatively slight, does not dispute that its action discriminated against Munoz and Miller within the meaning of the Act. *See Great Dane*, 388 U.S. at 32, 87 S.Ct. at 1796-97; *Laidlaw Waste Systems*, 313 N.L.R.B. 680, 1994 WL 57456 (1994).

Judge Henderson, nevertheless, devotes much of her opinion, Op. at 1-8, to a proposition not argued by petitioner before the Board or this court: that even if Diamond Walnut's placement of Miller and Munoz was discrimination, it was not a violation of § 8(a)(3) because it was not discrimination that "discourag[ed] membership in any labor organization."[3] It was just too insignificant to influence other employees, therefore the General Counsel never even made out a *prima facie* case. As we discuss *infra*, however, it is well-established that a party may not raise before us an argument not presented to the Board, *see Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 422 n. 10 (D.C.Cir.1990), and equally well-established that we do not consider arguments not presented to us. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n. 4 (D.C.Cir.1990). Judge Henderson explains her diversion from petitioner's case by relying on petitioner's broad statement of the issue presented

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3. The Board's decision to overturn the second election was based on its appraisal of the effect of the three unfair labor practices on the bargaining unit. Of course, it will be up to the Board on remand — at least in the first instance — to determine whether the Munoz case alone affected the election, which is a similar question to the one Judge Henderson raises.

(before the panel): "whether the NLRB *properly* found that Diamond . . . violated § 8(a)(3) and § 8(a)(1) of the Act." Judge Henderson's Op. at 1-2, n.1 (emphasis added). Under that reasoning — which we do not accept — we would be equally free to consider any legal issue implicit in that finding, such as whether the statute of limitations on the General Counsel's complaint had expired or, for that matter, whether the General Counsel was an imposter.

Under *Fleetwood*, after discrimination is shown, the burden shifts to the employer to establish that its treatment of the employees has a legitimate and substantial business justification. *See* 389 U.S. at 378, 88 S.Ct. at 545-46. Petitioner declined to give Munoz the forklift driver job because of its concern that driving that piece of equipment throughout the plant would be unduly risky in two respects. First, because of the bad feeling between strikers and replacements, Munoz would be endangered if confronted by hostile replacement workers in an isolated area. Second, since Munoz had participated in the bus tour during which the union had accused the company of producing tainted walnuts, Munoz would be tempted to engage in sabotage by using the 11,000 pound vehicle to cause unspecified damage. As for Miller, who was also on the bus tour, the company declined to put her in the "sensitive position of quality control assistant" where "the final visual inspection of walnuts is made prior to leaving the plant." In that position, she would have "an easy opportunity to let defective nuts go by undetected . . . or to place a foreign object into the final product, thereby legitimizing the Union's claim of tainted walnuts."[4]

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4. Petitioner also suggests that Munoz (like any other employee when unsupervised) could place foreign matter into the finished walnut bags, but this seems only an ancillary concern. The Board does not even mention this specific kind of product tampering regarding Munoz, surely

(Cont'd)

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The Board rejected as insubstantial the employer's reasons for assigning both employees. We discuss the two situations separately below, but before doing so we deal with a generic argument petitioner raises. It is claimed that the Board's entire approach in this case is inconsistent with its recent opinion in *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224, 1992 WL 390105 (1992). In *Sunland*, the Board considered the claim to reinstatement of a striking employee who was a paid union organizer. The Board concluded that the employer had a legitimate and substantial justification to deny reinstatement because of concerns over the union "agent's" possible conflict of interest. *See id.* at 1231. Here, the ALJ assumed, and the Board accepted, that the three returning strikers were "agents" (though not paid) of the union. Diamond argues that the *Sunland* right to deny reinstatement to paid union agents necessarily includes the lesser right to place restrictions on the jobs for which such agents will be considered, and it further contends that the fact that the employees in this case were not paid should make no difference. Insofar as Diamond argues that *Sunland* is inconsistent with the order under review, or at least should have been reconciled, it is an argument that should have been made to the Board. The ALJ determined that Diamond had not shown legitimate and substantial justifications for its treatment of the returning strikers, and, although he cited *Sunland*, he did so for the proposition that "the Board has continued to adhere to its

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because petitioner did not emphasize this point to the Board any more than it did in its brief and argument before us. Indeed, the Board only stated generally that "there is no evidence . . . of threats made by Miller and Munoz to damage or sabotage the Respondent's equipment or products." Our colleagues place a good deal more importance on this risk than does petitioner. *See* Judge Wald's Op. at 1276, n.8; Judge Henderson's Op. at 1284 & n.14.

view that there is *no* conflict of interest if an employee of the union seeks employment with a company to organize employees." (Emphasis added.) Although Diamond prevailed on an alternate theory before the ALJ, it naturally filed exceptions to this determination (called a finding). The posture of the case was such that if Diamond thought that under *Sunland* the existence of an agency relationship, whether paid or not, justified its treatment of the returning strikers, it should have argued as much in its appeal from the ALJ's decision. It did not. Our review of Diamond's brief in support of its exceptions to the ALJ's decision, as well as its opposition to the General Counsel's and union's exceptions, reveals that the company never cited *Sunland* to the Board, nor did it claim that the principles of *Sunland* should govern the case. We cannot fault the Board for failing to distinguish arguably applicable precedent when the petitioner never raised it or the proposition it stands for. *See* 29 U.S.C. § 160(e); *Sheet Metal Workers,* 905 F.2d at 422 n. 10.

A. Munoz

The Board rejected petitioner's proffered justifications for its placement of Munoz on the same grounds as did the ALJ. As to Diamond's purported fear for her safety, no evidence had been produced that Munoz was thought to be responsible for any violence, so there was no reason to believe she would have been a special target. The Board said, "[T]here is no specific evidence that any replacements harbored hostility toward these three strikers, and, if such evidence did exist as [Diamond] claims, we fail to see how placing them in the positions to which they were assigned would lessen the perceived danger of retaliatory acts being committed against them." The Board discounted Diamond Walnut's contention that Munoz would be under greater protection if closely supervised, noting that petitioner

had admitted that "Munoz freely roamed the plant unsupervised during her breaks." The Board did not dismiss out of hand, however, the proposition that concern for a returning striker's safety could ever amount to a substantial business justification for a "discriminating" placement; it was careful to state "we find that [Diamond] was not justified in restricting the strikers' job placements out of fear that the replacement employees would retaliate against *these* three strikers." By so reasoning, the Board implicitly rejected the view urged by Judge Wald[5] — which is inconsistent with *Fleetwood* — that an employer is *never* (or at least "hardly ever," *see* Op. at 1271, n.2) entitled to treat returning strikers "discriminatorily" (even with a substantial business justification) based on protected activity. *See also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938). The Board's reasoning also necessarily suggests that it does not consider the substantial justification test as coextensive with the test for employee misconduct because whether the returning strikers were threatened with violence does not turn on their culpability.

As for the possibility that Munoz would engage in forklift sabotage, the Board was more terse, stating only that "the strikers' conduct [referring to the bus tour] constituted protected . . . activity," and there was no evidence indicating that such protection was lost because of threats made by Miller and Munoz. If Munoz had uttered specific threats of sabotage, however, she would have lost her protected status and we would not be dealing with a *Fleetwood* situation at all; the General Counsel would not even have established a *prima facie* case.

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5. "Even more disturbing is the majority's toleration of employer discrimination based solely on an employee's participation in protected product disparagement during and as a strategic part of a labor dispute." Op. at 1270.

See, e.g., NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir.1977). It is true, as Judge Wald emphasizes, Op. at 1271-1272, that the Board has always insisted on specific evidence of striker misconduct before concluding that a striker has *lost* the protection of the Act. *See, e.g., Medite of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 790 (10th Cir.1995). But that doctrine is not relevant to this case; petitioner, as we have noted, is not claiming that Munoz and Miller were guilty of misconduct. And the *Board* has not overlapped these two distinct concepts in the manner in which Judge Wald advocates — her newly designated specific evidence "rule." *Compare, e.g., Medite of New Mexico*, 314 N.L.R.B. 1145, 1994 WL 508144 (1994) (examining whether an employee lost protection of the Act due to specific evidence of strike misconduct), *enf'd*, 72 F.3d 780 (10th Cir.1995); *Calliope Designs, Inc.*, 297 N.L.R.B. 510, 1989 WL 224492 (1989) (same), *with, e.g., Sunland, supra*.[6] After all, the *Fleetwood* substantial justification test assumes that the employees in question have engaged in *protected* activity. *See also General Electric Co. v. NLRB*, 400 F.2d 713 (5th Cir.1968), *cert. denied*, 394 U.S. 904, 89 S.Ct. 1012, 22 L.Ed.2d 216 (1969). So we take the Board necessarily to have concluded that the possibility of Munoz engaging in future sabotage by misuse of her forklift was simply not a sufficient risk to constitute a substantial business justification for her treatment.

Petitioner claims that the Board's conclusion lacks "substantial evidence," implicitly assuming that that conclusion

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6. Judge Wald relies on general dicta in two circuit court cases mixing up unprotected misconduct with substantial business justification. In neither case was the court reviewing a Board opinion that had done so. *See* Judge Wald's Op. at 1272 (citing *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir.1982); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1335 (1st Cir.1977)).

is a finding of fact. But it is apparent that the Board, in determining whether Diamond Walnut had a substantial business justification, was not really finding a fact; its determination was certainly not an appraisal of an historical happening. Instead, the Board made a normative judgment, a mixed policy/legal determination, which would typically be reviewed according to the arbitrary and capricious standard of the Administrative Procedure Act (reasonableness). The NLRA's judicial review provision, 29 U.S.C. §§ 160(e), (f), does not explicitly include the APA's arbitrary and capricious standard, but the Supreme Court has always assumed that Congress intended the judicial review provisions of both acts to be equivalent, *see Universal Camera v. NLRB*, 340 U.S. 474, 487, 71 S.Ct. 456, 463-64, 95 L.Ed. 456 (1951), and has read the NLRA as if it included an arbitrary and capricious test, *see, e.g., Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 309-10, 95 S.Ct. 429, 434-35, 42 L.Ed.2d 465 (1974), as have we, *see, e.g., Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C.Cir.1995); *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010 (D.C.Cir.1995); *cf. Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 (D.C.Cir.1996).[7]

An employer's concern for the safety of a few returning strikers, put in the midst of a majority of replacements in a strike marked by violence, may be genuine, but it is hardly unreasonable for the Board to insist, at minimum, on evidence of a concrete threat to those strikers. Otherwise, such a generalized concern could all too easily serve as a handy pretext for disfavoring returning strikers. Moreover, if there were such a threat, the employer might well be obliged to take adequate prophylactic measures that bear upon those who threatened the

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7. In *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 803-04, 110 S.Ct. 1542, 1558-59, 108 L.Ed.2d 801 (1990) (Scalia, J., dissenting), Justice Scalia assumed the APA actually applied directly.

violence rather than those who were threatened. *Cf. Brown v. Louisiana,* 383 U.S. 131, 133 n. 1, 86 S.Ct. 719, 719 n. 1, 15 L.Ed.2d 637 (1966) (rejecting the notion of a "heckler's veto" in the First Amendment context). In sum, we think the Board's conclusion on this point easily passes the reasonableness test.

Similarly, the Board was reasonable in its determination that the risk of Munoz engaging in sabotage while riding around on her 11,000 pound forklift — the petitioner seems to most fear her crashing the forklift into machinery — is not a substantial business justification for her disadvantageous placement in another job. Strikes tend to be hard struggles, and although this one may have been more bitter than most, there is always a potential danger of returning strikers, particularly while the strike is still ongoing, engaging in some form of sabotage. There is therefore undeniably some risk in employing returning strikers during a strike. But it could not be seriously argued that an employer cannot be forced to assume *any* risk of sabotage, because that would be equivalent to holding that an employer need not take back strikers during an ongoing strike at all — at least unless they manifested a break with the union. *See Fleetwood,* 389 U.S. at 380, 88 S.Ct. at 546-47. As the Supreme Court noted in *NLRB v. Town & Country Electric, Inc.,* __ U.S. __, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995), the Board must consider "alternative remedies" available to a company that contends that rehiring union organizers would pose a risk of "unlawful (or possibly unlawful) activity." *Id.* at __, 116 S.Ct. at 457. One factor to consider in evaluating the risk posed by a returning striker is the company's ability to detect his or her unlawful activity. In this regard, if Munoz engaged in forklift sabotage, it would presumably be readily detectable.

Nevertheless, different Boards at different times might reach different appraisals as to how much of a risk of sabotage

constitutes a substantial business justification. *Compare Sunland, supra.* It is important to recognize that where the Board draws the line has significant policy implications and the Board, as the Supreme Court has observed, is the agency Congress entrusted to formulate national labor policy. *See, e.g., Curtin Matheson,* 494 U.S. at 786, 110 S.Ct. at 1549. We therefore cannot quarrel with the Board's decision that the potential sabotage risk of giving Munoz the forklift driver job was not a *substantial* business justification. Petitioner has shown no particularized evidence to buttress its primary concern — that there is a risk that she would misuse the forklift — and therefore the Board's appraisal of the employer's justification as inadequate, keeping in mind the labor policy implications, is not unreasonable.

B. Miller

The Miller case is another matter. It will be recalled that petitioner declined to assign her to the post of quality control assistant, the job responsible for the final inspection of walnuts leaving the plant (she received a job paying 32 cents an hour less). The Board rejected the employer's justification, which was based on Miller's participation in the product boycott and bus tour leafleting, saying only — as we have noted with regard to Munoz — "the strikers' conduct constituted protected . . . activity and there is no evidence indicating that such protection was lost because of threats made by Miller and Munoz to damage or sabotage . . . equipment or products." With respect to Miller, we think the Board's determination that petitioner's business justification is insubstantial is flatly unreasonable.

All strikes, as we have recognized, are a form of economic warfare, but when a union claims that a food product produced by a struck company is actually tainted it can be thought to be

using the strike equivalent of a nuclear bomb; the unpleasant effects will long survive the battle. *See* Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. Chi. L. Rev. 351, 375 & n.113 (1994). The company's ability to sell the product, even if the strike is subsequently settled, could well be destroyed. If a customer becomes apprehensive to bite into Diamond's walnuts because of a concern at finding an impurity (even part of a worm), it is unlikely that a strike settlement will eliminate that visceral fear. Petitioner does not challenge the Board's conclusion that the "tainted walnuts" campaign was protected,[8] and it is not up to us, *sua sponte*, to decide that issue.

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8. The ALJ's conclusion that the product disparagement was protected appears to be based on cases interpreting the Supreme Court's decision in *NLRB v. Local Union No. 1229, Int'l Bhd. of Electrical Workers*, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953) (*Jefferson Standard*), which held that the dissemination of disparaging information that did not on its face reference the underlying labor dispute was disloyal and cause for termination. The ALJ relied on cases that have read *Jefferson Standard* to focus principally on the fact that the handbills in that case "omitted all reference" to the labor dispute, 346 U.S. at 476, 74 S.Ct. at 179, and thus to imply that any disparaging information no matter how permanent its potential damage that does refer to the labor dispute is "protected." *See, e.g., Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir.1989); *Cincinnati Suburban Press*, 289 N.L.R.B. 966, 968, 1988 WL 214126 (1988). But these courts overlooked the Supreme Court's statement in *Jefferson Standard* that "[e]ven if the attack were to be treated, as the Board has not treated it, as a concerted activity within the scope of those mentioned in § 7, the means used by the [employees] in conducting the attack have deprived the attackers of the protection of that section." 346 U.S. at 477-78, 74 S.Ct. at 179. And the Court apparently saw "concerted activity" to be an appeal for support for the union as opposed to a "separable attack purporting to be made in the interest of the public," *id.* at 477, 74 S.Ct. at 179, which a product disparagement campaign might be construed as, whether or not it references the labor dispute.

Compare Judge Wald's Op. at 1278-1279; Judge Henderson's Op. at 1284.[9] But to conclude the campaign was protected obviously does not determine whether the company's justification was substantial. The *Fleetwood* paradigm, we repeat, *assumes* protected conduct, as well as discrimination because of the protected conduct, before the burden shifts to the employer to produce a legitimate and substantial business justification. In that respect, not all protected conduct can possibly be thought equal; different protected conduct may well give rise to different justifications.

We therefore take the Board to mean, as we did regarding Munoz, that petitioner was obliged to show something more than it presented to support its concern that putting Miller in the quality control position would provide her "with an *easy opportunity* to let defective nuts go by undetected or to place a foreign object into the final product thereby legitimizing the Union's claim of tainted walnuts." (Emphasis added.) Again, we emphasize that if petitioner had actual evidence that Miller had sabotaged the walnuts, which Judge Wald insists be produced, Op. at 1271-1272, Miller would be unprotected by the Act, and petitioner need not offer any justification for discriminating against her. The issue, then, is not whether there is sufficient evidence for the Board to have determined that Miller did not engage in *past* misconduct, but rather whether the employer had a legitimate concern, based on the undisputed evidence and the employer's claimed factual inferences — presented to and unchallenged by the *Board* — that her employment as a quality control assistant would have posed an unusual and serious risk that she would engage in *future*

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9. Judge Henderson's observation that "Diamond knew Miller and Munoz's track record of attempting to damage Diamond economically" implies that she concludes that the product boycott was unprotected.

misconduct of a particular kind, at great cost to petitioner. *Cf. Steffan v. Perry*, 41 F.3d 677, 690 (D.C.Cir.1994) (en banc) (explaining circumstances in which the Defense Department can avoid the risk of future misconduct without a showing of past misconduct). The Board seems to have ignored those concerns without discussion, holding in effect (but not explicitly) that no matter what the objective risk to the employer of a returning striker's possible mischief the employer can never meet the substantial justification test.

The Board does not quarrel with petitioner's contention that the potential damage if the public learned of impurities in Diamond's walnuts would be extraordinary. One well-publicized worm might eviscerate the company's market share, especially in light of the public's "awareness" (due to the union's campaign) that Diamond's product might be tainted. Nor does the Board dispute that Miller in the quality control position would have had the capacity to cause such damage to the company. Judge Wald offers an explanation for rejecting Diamond Walnut's concerns not adopted by the Board, which relies on disputable interpretations of portions of the transcript (not even designated by the Board's counsel as part of our record[10] presumably because the Board did not base any findings on that testimony), *i.e.*, that the quality control assistant role is really not so important. It is simply not so, as Judge Wald asserts, Op. at 1273, that Diamond Walnut's quality control manager testified that its "final product" "inevitably ha[s] defects such as mold, rancidity, and *worms*" (emphasis added) (that sounds like the product boycott propaganda). In fact, he testified that the quality

10. *See e.g.*, Judge Wald's Op. at 1273 (citing Tr. 499); *id.* (same); *id.* (citing Tr. 516); *id.* at 1275 (citing Tr. 509-10); *id.* (citing Tr. 459); *id.* (citing Tr. 499-500); *id.* (citing Tr. 508); *id.* at 1275 n. 7 (citing Tr. 512-15).

control assistant's job is to alert the production people concerning defects in the production line and then it is up to the production people to "eliminate[ ] those defects from the product."[11]

The Board's counsel argues, as the Board implicitly concluded, that it is unfair to assume that an employee would behave in a disloyal and improper fashion. It is unnecessary, however, for us to make that assumption to decide the Board was unreasonable. The Board accepted petitioner's contention that Miller would have been placed "in the sensitive position . . . where final visual inspection of walnuts is made prior to leaving the plant," which for purposes of judicial review is equivalent to the Board making a finding to that effect.[12] Miller would therefore have been put in a rather acute and unusual conflict of interest in which her job for her employer could be thought to have as a function the rebutting of her union's claim. A similar conflict would be raised if she wished a bargaining unit job in the company's public relations department. This conflict makes all too likely the possibility that Miller would be *at least* inattentive to her product quality duties, and inattention is all it would take for Diamond to suffer a potentially crippling

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11. He does say on cross examination that walnuts leaving the plant have certain defects (although it is not clear whether he is referring, as he did earlier, to leaving the quality control department), but he certainly does not mention worms.

12. Judge Wald's review of the transcript, Op. at 1274-1275 & nn.6-7, again referring to portions not designated as "relevant" by the parties, *see* D.C. Circuit Handbook of Practice and Internal Procedures, IX.B.1., at 80 — leads her to a contrary *factual* finding, but that is just as impermissible for a reviewing court as it would be if the Board had made the finding rather than accepting the petitioner's factual contention.

blow. To make matters worse, any "mistake" by Miller on the product quality control line would not be easily attributable to her unless petitioner paid someone to stand all day looking over Miller's shoulder — which obviously exceeds any reasonable requirement. If Munoz ran her forklift into valuable machinery, she would run a risk of being discovered and would therefore be deterred. But Miller, as a quality control assistant, could simply avert her eye and cause the damage with apparently little risk of discovery. Unlike the typical situation in which, as *Town & Country* recognized, *see* __ U.S. at __, 116 S.Ct. at 457, an employer has other remedies to deal with sabotage, those remedies are clearly not adequate here. There is no remedy that might lie against Miller that could compensate Diamond for the type of damage even a moment's lapse on her part could cause. In short, she would have had a special motive, a unique opportunity and little risk of detection to cause severe harm. Both the risk Diamond faced in its placement of Miller was qualitatively different than a normal risk of sabotage, and the deterrence to Miller's possible misbehavior was peculiarly inadequate.

* * * * * *

Our two groups of concurring and dissenting colleagues — from opposite vantage points — object to the distinction we draw between the Board's view of the employer's justification for its treatment of Munoz on the one hand and Miller on the other. To be sure, the Board, as we noted, was rather cryptic and categorical in rejecting petitioner's claim regarding Munoz's potential for sabotage, but we think that is permissible because petitioner did not present the Board with facts that would significantly distinguish the risk of placing Munoz in the forklift job from the risk an employer runs reemploying *any* returning

striker. An agency cannot be expected to respond in a nuanced manner to a simplistic argument. *See City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C.Cir.1988) ("[T]he Commission cannot be asked to make silk purse responses to sow's ear arguments.").

Petitioner did, however, present a powerful argument that placing Miller in the position of quality control assistant presented extraordinary risks and here the Board's categorical rejection — in light of petitioner's more focused claim — is unacceptable. Our colleagues accuse us of forcing the Board in the future to "draw fine lines" between those cases in which an employer's discriminatory placement of returning strikers has a substantial justification and those that do not. Exactly so. That is the Board's job; that is what *Fleetwood* calls for. Essentially the Board has to take into account in a case such as this some consideration of the risk the employer seeks to avoid. Judge Wald challenges us to lay down broader guidelines as to what sorts of jobs, in what sorts of companies, during what sorts of strikes, might be thought equivalent to Miller's placement quality control position. But that is not the test of principled judicial decisionmaking. There may well be other situations in which an employer could produce compelling grounds for a relatively unfavorable assignment of a returning striker. The Board itself implied that a serious threat of violence against the striker might suffice. The legal proposition that governs *this* case, however, is that the Board must consider whatever special circumstances are presented by an employer asserting the defense of substantial justification, and it may not summarily reject an employer's specific and persuasive explanation.

Our disagreement with our colleagues turns very much on our view of the "proper — and properly limited — role"[13] of a

13. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

court of appeals reviewing an agency decision. We must take a case respecting the boundaries of the controversy, boundaries set by the agency's actual decision and petitioner's particular challenges to that decision. We simply are not at liberty to reconstruct the transcript before the ALJ to arrive at factual findings that the Board itself did not make. Nor are we free to base our decision on arguments that could have been presented to the Board — but were not; nor on legal reasoning the Board might have adopted — but did not.

We must, of course, give genuine deference to the Board's interpretation and application of the Act, as glossed by governing Supreme Court decisions, as well as the Board's factual findings and those legal/policy decisions implicit in the inferences drawn from those findings. But we are still obliged to ask in the last analysis whether the Board's decision, as to whether the employer's action was substantially justified by business reasons, falls within the broad stretch of reasonableness.[14] In this case, at least with respect to one part of the Board's decision, we conclude the Board exceeded the reasonableness limits.

So ordered.

WALD, Circuit Judge, with whom Chief Judge HARRY T. EDWARDS and Circuit Judge ROGERS and Circuit Judge TATEL join, concurring in part and dissenting in part:

In line with my dissent in the earlier panel opinion, I agree with the *en banc* majority that the Board reasonably determined

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14. Judge Wald would shrink our review of the Board's judgment for reasonableness, pointing out that we only review a "cold record." Op. at 1273. But the Board's decision is either reasonable or it is not, and the Board itself reviews a cold record. Cold or hot, it is the only record before us.

that Diamond Walnut failed to provide a legitimate and substantial justification, as required under the *Fleetwood* analysis, for assigning Alfonsina Munoz to a seasonal cracking and inspecting position in the grower's inspection department rather than a seasonal forklift operator position. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-80, 88 S.Ct. 543, 545-47, 19 L.Ed.2d 614 (1967). I continue to agree as well that the General Counsel failed to establish a *prima facie* case of discrimination by Diamond against Mohammed Kussair.[1] But I also believe, as I did with respect to the panel's similar decision, that the majority is fundamentally wrong in concluding that Diamond was justified in assigning Willa Miller to a seasonal case packer position instead of a seasonal quality control assistant position. This latter conclusion contradicts both the majority's own recognition that Board determinations of labor

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1. Judge Henderson contends that the General Counsel failed to establish a *prima facie* case of discrimination against any of the returning strikers because the different treatment that they received was not sufficient to "discourage membership in any labor organization." Dissenting opinion ("Dis. op.") at 1279-1283. I believe that Judge Henderson's contentions on this score are incorrect and represent an inappropriate refusal to defer to the Board's expertise regarding when employer conduct may discourage union membership. As the Supreme Court has cautioned, identifying discouragement is a "subtle thing[ ] requiring a high degree of introspective perception." *Radio Officers Union v. NLRB*, 347 U.S. 17, 51, 74 S.Ct. 323, 341, 98 L.Ed. 455 (1954) (internal quotations omitted). I also think that appellate judges should be wary of discounting the importance of what may appear to us to be small wage differentials, *see* Dis. op. at 1282 n.9; the record in this case, for example, establishes that as a case packer Miller earned only $5.50 an hour, and an increase in 32 cents an hour might well have been very significant to her, particularly given that she had been out on strike for two years. Transcript ("Tr.") at 775-76. However, as I agree with Judge Silberman that Diamond waived this argument by failing to raise it before the Board or in its briefs on appeal, I do not discuss this point in further detail.

policy must be upheld if reasonable and the majority's discussion of the reason why Munoz's assignment violated the anti-discrimination provisions of the Act. Even more disturbing is the majority's toleration of employer discrimination based solely on an employee's participation in protected product disparagement during and as a strategic part of a labor dispute. This remarkable innovation in labor-management law establishes a dangerous precedent that will be readily embraced by employers and will critically erode employees' statutory rights under the NLRA.

I. Proper Deference to the NLRB

I begin with a restatement of a fundamental principle of labor law, a principle that should have made an affirmance of the NLRB's decision here without doubt. The Supreme Court has repeatedly instructed lower courts that "the NLRB has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 S.Ct. 1542, 1549, 108 L.Ed.2d 801 (1990). Congress has assigned the Board, not the courts, the task of "applying the general provisions of the Act to the complexities of industrial life . . . and of appraising carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases from its special understanding of the actualities of industrial relations." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963) (internal citations, quotations, and additions omitted). Courts are supposed to accord "considerable deference," *Curtin Matheson*, 494 U.S. at 786-87, 110 S.Ct. at 1549, to Board policy determinations and rules interpreting the NLRA; they are to be upheld if reasonable, even if the court prefers an alternative policy, and the Board's application of the rules in any specific

instance is to stand so long as it is supported by substantial evidence. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42, 107 S.Ct. 2225, 2235, 96 L.Ed.2d 22 (1987); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03, 103 S.Ct. 2469, 2474-76, 76 L.Ed.2d 667 (1983); *Gilbert v. NLRB*, 56 F.3d 1438, 1444 (D.C.Cir.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 1261, 134 L.Ed.2d 210 (1996). The majority itself identifies this basic principle of labor law in its discussion of Munoz, but appears to lose sight of it altogether a few paragraphs later when it turns to Miller.

The need to defer to the Board is particularly acute when the question is whether an employer was justified in discriminating against employees on the basis of the employees' protected activities. "[P]rotected activity acquires a precarious status" if an employer can discriminate against employees simply for engaging in it. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23, 85 S.Ct. 171, 173, 13 L.Ed.2d 1 (1964). Determining whether an employer's discrimination was justified thus involves weighing employer prerogatives against employee rights, and the Board's expertise is critical to ensuring that " 'the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy' " is achieved. *Fleetwood*, 389 U.S. at 378, 88 S.Ct. at 546 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967)). Thus, courts have repeatedly underscored that where the Board has "draw[n a] line between the[ ] conflicting rights [of employees and employers,] . . . its determination, unless illogical or arbitrary, ought not to be disturbed." *Allied Indus. Workers, Local Union No. 289 v. NLRB*, 476 F.2d 868, 880 (D.C.Cir.1973) (quoting *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir.1965)); *see also Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253,

256 (6th Cir.1990); *NLRB v. Chelsea Labs., Inc.*, 825 F.2d 680, 683 (2d Cir.1987).[2]

There seems to me no question but that the Board's conclusion that Diamond's discriminatory treatment of Miller was unjustified was neither arbitrary nor illogical. The Board's conclusion rested on a perfectly reasonable determination of labor policy under the Act, namely that an employer must have some credible evidence linking an employee to potential product tampering before the employer can discriminate against her because it fears she will undertake such misconduct. The solitary fact that the employee supports a union that has engaged in protected product disparagement as part of its strike strategy is not enough to justify discriminating against the employee in

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2. By some mysterious process of induction, the majority concludes that my position is that "an employer is *never* (or at least 'hardly ever') entitled to treat returning strikers 'discriminatorily' (even with a substantial business justification) based on protected activity." Majority opinion ("Maj. op.") at 1265. As the preceding passage makes clear, this is *not* my position; my position is instead that it is especially critical that courts defer to reasonable Board determinations of when discrimination based on protected activity is and is not justified. It is worth noting, however, that the situations in which employer discrimination based on protected activity has been deemed justified are relatively few, the most frequent example being that of an employer who does not reinstate employees to their former positions after an economic strike because the positions have been filled by permanent replacements. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46, 58 S.Ct. 904, 910-11, 82 L.Ed. 1381 (1938); *see generally* The Developing Labor Law 199-249 (Patrick Hardin, et al. eds., 3d ed.1992) (providing an overview of instances when employer discrimination has been held to be justified and when it has not). This suggests to me that the Board and other courts agree that employer claims of justified discrimination against employees solely because of protected activities should be viewed with some caution, given the threat to employee rights that such discrimination represents.

the terms of her employment. The Board's determination here was based on a long-adhered-to rule, upheld by several courts, requiring an employer to have specific evidence of past or imminent misconduct by a particular employee before it may discriminate against that employee. *See, e.g., Medite of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 790 (10th Cir.1995) (" 'an employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct' ") (quoting *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir.1982)); *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7th Cir.1992) ("To lawfully deny an employee reinstatement at the conclusion of a strike [because of strike misconduct], an employer must produce evidence connecting the discharged employees to specific strike misconduct."); *see also General Tel. Co.*, 251 N.L.R.B. 737, 739, 1980 WL 12269 (1980), *enf'd*, 672 F.2d 895 (D.C.Cir. 1981). Here, the Board's finding that there was no evidence whatsoever to connect Miller to any threat of product tampering was supported by substantial evidence; Dan O'Connell, Diamond's vice-president for operations, testified that Diamond had no reason to believe that Miller or any of the returning strikers had ever threatened to damage Diamond's product, *see* Tr. at 442, nor was there was evidence specifically connecting Miller to the other forms of misconduct — violence and sabotage — that Diamond identified as being concerns. Joint Appendix ("J.A.") at 17-18.

The majority contends that this specific evidence rule is not relevant here, because if there were specific evidence of misconduct on the part of the returning strikers, they would have lost the protections of the NLRA and the *Fleetwood* analysis would no longer apply. Maj. op. at 1265-1266. With all respect, I think the majority is wrong. The specific evidence rule is in

reality an application of the *Fleetwood* analysis. The rule represents the Board's belief that an employer does not have a "legitimate and substantial business justification" for discriminating against an employee because of employee misconduct when the basis for the employer's belief that the employee engaged in misconduct is not specific acts or threats by the employee but only the fact that she engaged in protected activity. *See Midwest Solvents, Inc.*, 696 F.2d at 765 (noting that "strike misconduct . . . may constitute a 'legitimate and substantial business justification' for refusing to reinstate a [striking] employee," but only if the "employer's determination not to reinstate . . . [was] based on evidence that the striker personally engaged in strike misconduct"); *see also Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1335 (1st Cir.1977) (citing *Fleetwood* and noting "[i]t is well established that serious misconduct during a strike justifies a refusal to reinstate after the strike is over").[3] Nor should it be determinative that the misconduct at issue is future as opposed to past misconduct. The same basic question, namely are the employer's fears of misconduct justified, arises where an employer discriminates against an employee because it thinks the employee will engage in misconduct in the future as when it discriminates because it thinks the employee has done so in the past. Some specific evidence connecting the employee to the misconduct is needed before this question can be answered in the affirmative in either case. As the Board noted repeatedly in its opinion, here "there [wa]s *no* evidence" connecting any of the returning strikers to the types of misconduct that Diamond feared. J.A. at 17-18 (emphasis added).

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3. The connection between the *Fleetwood* analysis and the specific evidence rule is also visible in Board decisions. *See, e.g., General Chemical Corp.*, 290 N.L.R.B. 76, 82, 1988 WL 213875 (1988); *Owen Joist Corp.*, 248 N.L.R.B. 589, 592, 1980 WL 11268 (1980).

Appendix B

Paradoxically, the majority accepts the Board's insistence that Diamond must provide some evidence of threats by the returning strikers or replacement workers in affirming the Board's decision that Diamond's discriminatory treatment of Munoz was not justified. Maj. op. at 1266. But it then fails absolutely to tell us how the Board went so wrong in requiring that Diamond also provide specific evidence of potential misconduct with regard to Miller. According to the majority, the Board's error was its failure to "realize" that not all protected employee activity is created equal, and that product disparagement is so qualitatively different from other protected activity that it justifies a discriminatory response where violence would not. *Id.* at 1267-1268. Thus, the majority seems to say, the Board ought to have made an exception to its usual rule requiring specific evidence before an employer is justified in discriminating against an employee out of fear of misconduct because the discrimination against Miller was based on a fear of product tampering. An employer is entitled to discriminate against employees who support a union that has engaged in product disparagement so as to keep them out of positions where they might be able to harm the employer's product.

It is obvious, however, that whether or not to carve out such an exception from the specific evidence rule for employer fears of product tampering is quintessentially a question of labor policy and should be resolved by the Board on the basis of its widespread knowledge of industry and its experience with a legion of strike situations, not by this court on the basis of a cold record involving one particular incident. The Board has clearly decided not to make any such exception, and its decision is eminently reasonable. The majority's product tampering exception rests on dubious and undocumented assumptions regarding the dangerousness of product tampering as opposed

to other forms of misconduct and on a distortion of the record regarding the opportunities for product tampering that quality control assistants possess. Worse, the exception will force the Board into extraordinarily difficult line-drawing endeavors in future cases and has the potential to significantly undercut the ability of employees to appeal to the public for support during labor disputes.

II. Drawing the Line: Product Tampering and the Exaggerated Dangers of Quality Control

The core justification that the majority gives for its new product tampering exception is that the economic risk to the employer posed by product tampering is far greater than the risk associated with other forms of misconduct (presumably even violence inside the plant), and therefore an employer is justified in acting to limit this risk on the basis of less evidence or no evidence that the returning employee may present a risk in this regard. Based on the record here, the majority's assumption regarding the impact of an isolated or even a few random incidents of product tampering is greatly exaggerated. According to the majority, even a "moment's lapse" in Miller's vigilance against damaged walnuts could cause Diamond "severe harm," Maj. op. at 1269, and "[o]ne well-publicized worm might eviscerate the company's market share." *Id.* at 1268. But as David Pedro, Diamond's quality control manager, testified, some walnuts, like any "natural or agricultural commodity," inevitably have "defects" such as mold, rancidity, and worms, and Diamond's final product is no exception from that unfortunate phenomena. Tr. at 499. The goal of the quality control department is not so much to ensure that Diamond's packaged product contains no defective walnuts at all, but rather to keep Diamond's walnuts within the levels for defective walnuts

established by the USDA. *See* Tr. at 499, 516.[4] Thus, the majority's dire predictions about one wormy walnut or even

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4. As the majority accuses me of distorting the transcript in my reading of Mr. Pedro's remarks, Maj. op. at 1268-1269, I quote them here verbatim. After describing a union flyer that showed pictures of Diamond walnuts with the "statements . . . *mold, insect damage, dead worm in shell, [and] rancid*" directly underneath, the following colloquy took place between Ms. Green, Diamond's counsel, and Mr. Pedro:

> Ms. Green: Do the walnuts that come from Diamond Walnut's production line have *those types of defects* after they leave the quality assurance assistant's department?
>
> Mr. Pedro: Okay. There is a tolerance for *those defects*. And *those defects* do occur. It's in a natural or agricultural commodity. Any agriculture commodity has specifications or levels for *those defects*. We do have levels of *those types of defects*.
>
> Ms. Green: Okay. So basically, is it the quality assurance assistant's job to make sure that *those levels of defects* remain low when they come out of the process?
>
> Mr. Pedro: Their job is to monitor *those levels* and report *those levels* and to record the data. The production people are responsible for grading that product and then eliminating *those defects* from the product.

Tr. at 499 (emphasis added). Later, on cross-examination Mr. Absalom, the union's counsel, referring to the flyer again, had this exchange with Mr. Pedro:

> Mr. Absalom: I gather from your testimony that it is true that walnuts sometimes leave the plant with some of *these defects* in them, correct?

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several wormy walnuts bringing down the company's sales are largely unfounded.[5]

Nor can the majority dredge up any evidence or theory indicating that product tampering is more harmful *per se* than other misconduct so as to justify a harsher rule. Diamond officials testified, for example, that sabotage of expensive processing equipment for any significant period of time during the peak season could cost Diamond hundreds of thousands of dollars in repairs and lost product. Tr. at 403-06. In its brief, the Board cites the substantial costs that could result if an employee sabotaged a company's computer system. Yet the majority

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> Mr. Pedro: Correct.
>
> Mr. Absalom: And it's true that walnuts leave the plant with *insect damage and rancidity* for example?
>
> Mr. Pedro: Yes, that's correct.
>
> Mr. Absalom: And what you're principally concerned with in the quality control department is determining whether the level of *those defects* in the samples that are taken exceed the threshold levels permitted by the USDA, is that correct?
>
> Mr. Pedro: Yes, that they don't exceed those.

Tr. at 516 (emphasis added).

5. The discovery of some kind of foreign matter in a package of walnuts would be far more dangerous to Diamond's reputation and sales. But, as discussed below, the majority must downplay the risk of this sort of aggressive product tampering in order to conclude that Diamond was justified in discriminating against Miller but not against Munoz.

nowhere explains why employers automatically get more leave to discriminate against workers in the case of product tampering and especially in the case of agricultural or food or drug products designed for human consumption. What about the manufacturers of cars that people ride in or toys that children play with or even employers whose business survival depends on the use of expensive equipment? Why should food product manufacturers be the only ones eligible for heightened protection against tampering?

But even were we to accept the majority's *ad hoc* value judgment that the economic consequences of agricultural product tampering are uniquely severe, it is still not at all clear where to draw the line as to what jobs must be labeled off limits to any employee who has not renounced her allegiance to a union that engaged in protected product disparagement during a labor conflict. Should it be the employer's call, or the Board's, or the courts'? The majority avoids confronting this problem by claiming that as a quality control assistant Miller would be uniquely well positioned to harm Diamond's product, because she had only to turn a blind eye to moldy and wormy walnuts rolling down the line and Diamond's reputation and market share would plummet. Unfortunately for the majority, this claim is based on a highly selective and inaccurate reading of the record.

To begin with, the record demonstrates that quality control assistants perform a variety of functions and are not the only employees involved in ensuring that damaged and defective walnuts are caught, suggesting that their opportunities for passively harming the product are far more limited than the majority believes.[6] Some quality control assistants, for example,

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6. The majority argues that in emphasizing the varied jobs performed by quality control assistants and the role that other employees and outside

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inspectors play in ensuring the quality of Diamond's final product, I am improperly making a factual finding that differs from the Board's. Maj. op. at 1268 n.12. On the impropriety of appellate factfinding and appellate contortions of the administrative record, the majority and I are in full agreement, but ironically it is the majority who is violating this important principle here. As an initial matter, I disagree that the Board itself made any finding that the quality control assistants are the last to inspect the walnuts; the language quoted by the majority is quite clearly the Board's recapitulation of the argument Diamond made in its defense, not an independent finding of fact. *See* J.A. at 17 ("Respondent states that when it received the Union's letter [wherein several strikers offered to return to work], it decided against placing Miller in the sensitive position of quality control assistant where the final visual inspection of walnuts is made prior to leaving the plant."). I also fail to see how anyone can read the Board's decision, holding that Diamond's fears of product tampering did not justify its discrimination against the returning strikers, as being anything but a rejection of Diamond's factual inferences. Maj. op. at 1267-1268. More to the point, it is the majority, not the Board, that emphasizes the opportunities for product tampering attendant on the quality control assistant position. Indeed, the Board appears to have considered any such opportunities to be either insignificant or irrelevant, since it makes no reference to them at all in rejecting Diamond's defense. *See* J.A. at 18.

The majority also takes me to task for referring to portions of the transcript of the ALJ hearing that are not contained in the joint appendix. Maj. op. at 1268 n.12. But as governing statutes, appellate rules and our local circuit procedures make clear, "[a]ll parts of the record retained by the agency shall be part of the record on review for all purposes." Fed. R.App. P. 17(b); *see also* 28 U.S.C. § 2112(b) (same); Fed. R.App. P. 16(a) ("order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency"); D.C. Circuit Handbook of Practice and Internal Procedures, IX.B.1., at 80 ("Failure to include relevant parts of the record in the appendix does not preclude the court from relying on

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weigh boxes and bags of nuts and make sure the nuts are appropriately packaged. These functions do not involve, primarily, checking the quality of nuts. *See* Tr. at 509-10; *see also* Tr. at 414, 459, 472. And even those quality control assistants who are involved in monitoring product quality do not bear responsibility for actually pulling damaged or defective nuts. Rather, they provide information on the level of damaged and defective nuts in a particular crop to the production employees who look for and pull the defective nuts. *See* Tr. at 470, 490-92, 499-500. In addition, there are inspectors from the Dried Fruit Association at Diamond's plant who inspect Diamond's product after the quality control assistants to ensure that the nuts conform to USDA quality levels. *See* Tr. at 492-93, 508.[7]

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that material."). An examination of the full record would also appear appropriate in light of the Supreme Court's instruction in *Universal Camera v. NLRB* that courts must uphold the Board's findings if they are supported by substantial evidence on "the record as a whole." 340 U.S. 474, 491, 71 S.Ct. 456, 466 95 L.Ed. 456 (1951).

7. The record also demonstrates that the majority's assessment of the risk Miller posed is very much one-sided, and ignores the risk of product harm that resulted from Diamond's decision *not* to put Miller in the quality control assistant position. Miller had served as a quality control supervisor for seven or eight years prior to the strike. Tr. at 139. David Pedro testified not only that Miller was well-qualified to identify damaged or defective walnuts, but also that an experienced quality control worker would be better able to spot such walnuts than a new trainee. Tr. at 512-15. If Diamond gave the open quality control position to a new applicant for employment who did not have Miller's union ties but also did not have Miller's experienced eye, it may have increased the risk that defective nuts would not be spotted during processing. This may well illustrate the wisdom of letting the Board draw the inferences from a site-specific record of the labor situation in a particular plant, not the court.

Appendix B

A review of the record also makes clear that Diamond was if anything more concerned that Miller would engage in active product tampering as that she would do so passively, by allowing defective walnuts to roll past, and further that many other employees would have a similar opportunity to affirmatively damage Diamond's finished product. Diamond officials emphasized that as a quality control assistant Miller would work without close supervision and that therefore she would have an opportunity to insert foreign objects into packages of walnuts. For example, Dan O'Connell testified that quality control assistants move around the plant extensively "with virtually no supervision," Tr. at 400, and that the areas where the finished product was stored were often deserted, so that employees in those areas "could do virtually anything they wanted to to the product" without detection. Tr. at 413; *see also* Tr. at 410. According to O'Connell, Diamond officials "did not feel that it would be prudent to give someone who might have the thought of doing something to the product . . . the opportunity to do it by putting them in an unsupervised, unobserved position." Tr. at 412. And Vincent Brown, Diamond's human resources director, provided a graphic description of the type of product tampering Diamond feared the returning strikers would do if they were given quality control positions: "[i]f I'm in charge of testing quality and I take a used condom or a used syringe and I put it in a bag of walnuts and ship it off to the Netherlands, now . . . I have an international incident." Tr. at 621; *see also* Tr. at 471. But the record makes clear that there were other positions, such as that of forklift operator, that were similarly unsupervised. *See* Tr. at 400, 413. If the risk of product tampering associated with the quality control position stems in part from the fact that the lack of supervision provides greater opportunities to actively damage Diamond's finished product, then there is no basis on

which to distinguish between quality control assistants and these other similarly unsupervised employees.[8]

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8. Indeed, the majority's acceptance of Diamond's discrimination against Miller cannot be reconciled with its rejection of Diamond's discrimination against Munoz. Both Miller and Munoz were strongly supportive of the union during the strike. Tr. at 163, 220-21. Both participated in a cross-country bus tour publicizing the union's boycott of Diamond walnuts, during which the union disseminated leaflets claiming that walnuts packaged by the replacement workers were contaminated. Tr. at 162-63, 220-21. Munoz's ties to the union's product disparagement campaign were, if anything, clearer than Miller's, since Munoz acknowledged passing out the leaflets on occasion and Miller did not. *Compare* Tr. at 221 *with* Tr. at 159-61. And, as noted above, Diamond officials testified that forklift operators were not closely supervised and were required to travel to remote areas of the plant. Tr. at 400, 413. Yet the majority maintains that Diamond was justified in refusing to put Miller in a quality control position, but not in refusing to put Munoz in a forklift operator position.

Nor, as the majority implies, is its inconsistent treatment of Munoz and Miller justified by Diamond's failure to adequately identify product tampering as a concern in its treatment of Munoz. It is clear from the testimony of Diamond officials that Diamond was concerned that forklift operators would have opportunity to tamper with the finished product, *see* Tr. at 400, 413, 420-21, and Diamond claimed that its fears of product tampering justified its refusal to put Munoz in the forklift operator position in its filings with the Board and in both its panel and *en banc* briefs here. *See* Employer's Limited Exceptions to the Decision of the Administrative Law Judge at 34 & n.26 (noting that forklift operators, who are not closely supervised had an opportunity to "mix a harmful substance in with the walnuts" and commenting that this concern was "not a farfetched supposition, given the nature of the boycott campaign in which Munoz was actively involved"); Pet. Br. (panel) at 36 (same); Pet. Br. (*en banc*) at 39 (same). Furthermore, the Board mentioned product tampering as a concern of Diamond's in regard to Munoz. J.A. at 18 ("As the [ALJ] found, the strikers' conduct [in distributing leaflets disparaging Diamond's

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An examination of the record outside of the majority's distorting lens thus makes clear that quality control assistants do not have a particularly unique opportunity to tamper with Diamond's walnuts, and recognition of this fact demonstrates the over-expansive scope of the majority's product tampering exception. While some jobs may be better suited for launching product sabotage than others, it will not be uncommon for employees in many different positions in a processing plant to gain opportunities for product tampering. Here, for example, the record suggests that not just the quality control assistants but also any of the far more numerous employees involved in processing the walnuts could let defective and damaged walnuts flow through into the final packaged product, and virtually all employees had an opportunity to tamper with the finished product during breaks or if their jobs involved moving around the facility. As a result, the majority's product tampering exception could potentially cover every employee in a plant.

Finally, it also is not apparent why employer discrimination based on unsupported product tampering fears should be justified only where a union has previously engaged in protected product disparagement. The suggestion in the majority opinion is that when the union has already made claims of deteriorating product quality, employees who support the union will be tempted to make the union's claims a reality. But, whether or not a union has engaged in prior disparagement, it would still be able to exploit any product impurities to its advantage. As a result, if discrimination based on generalized fears of product tampering

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product] constituted protected Section 7 activity and there is no evidence that such protection was lost because of threats made by Miller *and Munoz* to damage or sabotage the Respondent's equipment or products.") (emphasis added).

is justified because of the uniquely severe economic impact that product tampering can have, employers can make out a good case for refusing to hire any employees who do not renounce their allegiance to the union whenever a labor conflict is ongoing.

The impossibility of cabining the majority's newly-hatched exception to the Board's traditional rule that employers must have specific evidence linking an employee to potential misconduct before discriminating provides a powerful reason why the Board was justified in refusing to adopt it in the first instance. Section 7 of the NLRA provides employees with the right "to self-organize, to form, join, or assist labor organizations, . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1994). The majority's exception would go far to erode or even eliminate these important section 7 rights during an ongoing labor dispute, since its logic leads insistently toward allowing employers during a strike to discriminate against employees who continue to support the union based on unproven and generalized fears of employee misconduct that are derived solely from employee participation in supposedly protected union activities. At a minimum, the majority's rule will force the Board to draw difficult fine-line distinctions between risks serious enough to merit employer action based on generalized fears and not so serious risks. The Board can hardly be faulted for seeking to avoid such an unenviable task. *Cf. Eastex, Inc. v. NLRB*, 437 U.S. 556, 574, 98 S.Ct. 2505, 2516, 57 L.Ed.2d 428 (1978) ("It is apparent that the complexity of the Board's rules and the difficulty of the Board's task might be compounded greatly if it were required to distinguish not only between literature that is within and without the protection of § 7, but also among subcategories of literature within that protection.").

The majority insists that it is not overstepping the "proper — and properly limited — role," Maj. op. at 1269 (citation omitted), of an appellate court in requiring the Board to allow an employer to discriminate against an employee because of generalized fears of product tampering; instead, according to the majority, it is merely forcing the Board to "take into account . . . the risk that the employer seeks to avoid" and making the Board do its "job." *Id.* at 1269. What the majority refuses to acknowledge is that the Board *did* do its job here. Without question, given the potential for undercutting employees' rights and the difficulties in administration that the majority's product tampering exception represents, the Board's decision not to adopt such an exception was eminently reasonable. Were this court to truly adhere to its limited role in reviewing an agency decision the Board's determination would be affirmed. Unfortunately, however, the majority finds restraint easier to proclaim than to practice.

III. Product Disparagement and Appeals to the Public

The Board's refusal to allow employers to discriminate against employees on the basis of generalized fears of product tampering was also reasonable because it accords with the Board's current approach to product disparagement and with the Board's recognition of the importance of employee appeals for public support during a dispute. Initially, the Board viewed any "[s]tatements made by employees to the public which deliberately cast discredit upon their employer's product or service" as unprotected, regardless of whether the statements were made in connection with a labor dispute and regardless of whether the statements were true. *Patterson-Sargent Co.*, 115 N.L.R.B. 1629-30 (1956); *see also Coca-Cola Bottling Works*, 186 N.L.R.B. 1050, 1054 (1970), *enf'd in part*, 466 F.2d 380

(D.C.Cir.1972); *Jefferson Standard Broad. Co.*, 94 N.L.R.B. 1507, 1511-12 (1951), *enf'd sub nom. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953) (*Jefferson Standard*). But over the last few decades the Board changed its approach and its current position is that in some circumstances employee criticism of an employer's product or service is protected activity under the NLRA. Specifically, the Board now views protected activity as encompassing criticism that clearly relates to an ongoing labor dispute, is not malicious in tone, and is not deliberately or recklessly untrue. *See, e.g., Cincinnati Suburban Press, Inc.*, 289 N.L.R.B. 966, 967, 1988 WL 214126 (1988); *Emarco, Inc.*, 284 N.L.R.B. 832, 834, 1987 WL 89746 (1987); *Cordura Pubs., Inc.*, 280 N.L.R.B. 230, 231-32, 1986 WL 53893 (1986); *Richboro Community Mental Health Council, Inc.*, 242 N.L.R.B. 1267, 1267-68, 1979 WL 9209 (1979); *see also American Arbitration Ass'n, Inc.*, 233 N.L.R.B. 71, 74-75, 1977 WL 9257 (1977) (ridiculing content and tone of questionnaire distributed by employee rendered it unprotected under the Act); *see generally Sierra Publ. Co. v. NLRB*, 889 F.2d 210, 216-18 (9th Cir.1989) (detailing the shift in the Board's approach).[9]

This change in the Board's approach to product disparagement is not, as the majority suggests, Maj. op. at 1267 n.8, suspect in light of the Supreme Court's decision in *Jefferson Standard*. The Court ruled in *Jefferson Standard* that a television

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9. In some cases, the Board has distinguished between acceptable criticism of an employer's product or service and "product disparagement." *See, e.g., Allied Aviation Serv. Co.*, 248 N.L.R.B. 229, 231, 1980 WL 11228 (1980). But this is a distinction more in nomenclature than in substance, since clearly the critical statements upheld by the Board would be perceived by an ordinary person as "disparaging" the employer's product.

station did not act unlawfully when it fired nine technicians who had circulated a handbill that was sharply critical of the station's programming. In holding that the NLRA did not require the employer to tolerate such "disloyalty," the Court emphasized that the technicians' criticism of the station's programming "omitted all reference" to the "labor controversy" then existing between the technicians and the station. *Jefferson Standard*, 346 U.S. at 472, 476, 74 S.Ct. at 176, 178-79. Thus, in treating criticism of an employer's product that is related to an ongoing labor dispute as protected the Board has adhered to the specific holding of the *Jefferson Standard* opinion, and the Board's approach has been upheld by numerous courts. *See, e.g., Sierra Publ. Co.*, 889 F.2d at 217-19; *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 814-15 (2d Cir.1980); *Community Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 610 (4th Cir.1976); *see also* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. Pa. L.Rev. 921, 935 (1992).

More to the point, the Board's current approach is based on its awareness of the vital role of public support in winning labor disputes, an awareness shared by the Supreme Court. *See Eastex, Inc.*, 437 U.S. at 565, 98 S.Ct. at 2512 ("We also find no warrant for petitioner's view that employees lose their protection under the 'mutual aid or protection' clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."). Given capital mobility and the threat of permanent replacements, labor battles are increasingly fought not on the picket line but in the arena of public opinion, through boycotts, corporate campaigns and other appeals. *See* Melinda J. Branscomb, *Labor, Loyalty, and the*

Corporate Campaign, 73 B.U. L.Rev. 291, 293-96 (1993); James G. Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 Tex. L.Rev. 889, 902-10 (1991). The success of these appeals turns on the ability of employees to ally their cause with the public interest, and in furtherance of that goal employees often seek to demonstrate how their interests and those of the public coincide by arguing that labor disputes or poor working conditions are harming the employer's product. Thus, for example, workers have sought to gain public support by claiming that extended negotiations on a new contract were putting a newspaper's continued survival into jeopardy and sending the paper "speeding downhill," *Sierra Publ. Co.*, 889 F.2d at 214, or that staff shortages and bad facilities were undercutting patient care at a hospital. *Misericordia Hosp. Med. Ctr.*, 623 F.2d at 810-11. And so here, the union circulated leaflets claiming that Diamond's use of replacement workers had resulted in low quality walnuts, not out of a general disloyalty or dislike of Diamond but rather in an attempt to bring consumers onto its side so as to end the strike and return the regular employees to their old jobs.

A limited and legitimate use of product disparagement therefore may often be a critical tool in labor's arsenal. The Board has emphasized this point in its decisions holding some forms of product disparagement to be protected, commenting that "were we to hold that employees must limit their requests for third-party assistance to the strict confines of the specific arguments raised with their employer, we would, in many cases, be depriving employees of what may be their most cogent argument for obtaining the third party's aid." *Allied Aviation Serv. Co.*, 248 N.L.R.B. at 231 n. 10; *see also Sierra Publ. Co.*, 889 F.2d at 217 ("[i]f unions are not permitted to address matters

that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision."); *Emarco, Inc.*, 284 N.L.R.B. at 834 ("employee speech is often an essential means of achieving group goals and to deny protection to this type of activity would nullify the rights guaranteed by section 7 of the Act"). In addition, product quality may be a central concern of employees, either because they fear that a low quality product will lead their employer to go out of business and cost them their jobs, or because they identify with their work and genuinely care that the product with which they have identified their working lives be a worthy one. *See* Estlund, *supra,* at 949-60.

The majority's castigation of any kind of product disparagement, true or untrue, strike-related or not, to a second-class status in the scheme of protected activity and to a top rung on the hierarchy of employer justifications for discrimination may significantly restrict the ability of employees to utilize public appeals in contemporary labor struggles or to voice their concerns about product quality. The majority maintains that "it is not up to us, *sua sponte,* to decide th[e] issue" of whether the union's leaflets attacking the quality of Diamond's walnuts during the strike were protected. Maj. op. at 1267-1268. But the majority's holding is crystal clear: at a bare minimum, it says that an employer can refuse to place returning employees who still support the union in positions where they could affect product quality if the union has engaged in product disparagement during an ongoing labor dispute. Hence, a union is on notice that it exposes supportive employees to potential discrimination if it decides to resort to product disparagement of any kind. Few unions may be willing to take this risk.

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The majority's decision that Diamond's discrimination against Miller was justified is internally inconsistent, contradicted by the record, and at odds with governing law. Most importantly, it represents a totally unwarranted interference with the Board's ability to establish labor policy. Whether dire predictions regarding its potential impact prove accurate only time will tell. It may be that the holding will be viewed as an anomaly, the D.C. Circuit's inexplicable "wormy walnut rule." I fear, however, that will not be so; employers will readily seize the opportunity to exploit the new hole in the NLRA's protective shield against arbitrary employer discrimination and the Board's efforts to balance employee and employer rights will be impeded by this unfortunate decision, as will employees' attempts to exercise their statutory rights during bitter and lengthy strikes. For all these reasons, I would uphold the Board's determination that Diamond's discriminatory treatment of Miller was not justified by any legitimate or substantial reason and I respectfully dissent from the majority's decision to the contrary.

HENDERSON, Circuit Judge, with whom SENTELLE, Circuit Judge, and RANDOLPH, Circuit Judge, join, concurring in part and dissenting in part:

No clear winner emerges from the court's decision. Diamond Walnut (Diamond) prevails on its petition for review with respect to two employees, the National Labor Relations Board (Board) prevails on its cross-petition for enforcement with respect to one employee and the intervenor unions, Cannery Workers, Processors, Warehousemen & Helpers Local 601 of the International Brotherhood of Teamsters, AFL-CIO and the International Brotherhood of Teamsters, AFL-CIO (Unions), will probably get a third bite at the representation election apple. The loser, however, is clear — the employer who, in future,

must determine where to place returning strikers in order to comply with the National Labor Relations Act (Act). The majority opinion, with its placement of Miller, Munoz and Kussair into three distinct doctrinal boxes,[1] provides lots of words but scant utility.

I.

Too little attention has been paid in this case to the General Counsel's burden in establishing a *prima facie* case of discrimination.[2] The majority concludes perfunctorily that

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1. The majority finds a *prima facie* case of discrimination but a legitimate and substantial business justification as to Miller, a *prima facie* case but no legitimate and substantial business justification as to Munoz and reinstates the panel judgment as to Kussair.

2. Notwithstanding the majority's and Judge Wald's protestations, the issue of the General Counsel's *prima facie* case is properly before the court. First, Diamond argued in its brief to the Board that the General Counsel had not established a *prima facie* case. *See* Employer's Opposition to Counsel for the General Counsel and Counsel for the Charging Party's Exceptions to the Decision of the Administrative Law Judge at 6-19 (No. 32-CA-13479) (arguing that Diamond's placement of workers was non-discriminatory because, regardless of union activity, workers were not entitled to have their seniority or qualifications from their previous *permanent* positions considered in their placement in *seasonal* jobs). Diamond's initial brief to the panel described the issue presented simply as "whether the NLRB properly found that Diamond . . . violated section 8(a)(3) and 8(a)(1) of the Act" and thus encompassed the question whether the General Counsel had established a *prima facie* case. Moreover, the majority is simply wrong in its statement that Diamond "does not dispute that its action discriminated against Munoz and Miller within the meaning of the act." Maj. Op. at 1263. What Diamond does not dispute is that it considered Miller's and Munoz's protected activity in placing them. As discussed in more detail *infra*, that

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Diamond's placement of Miller and Munoz constitutes discrimination within the meaning of the Act on the basis of two factors: (1) Miller and Munoz did not receive the highest paying jobs for which they were qualified[3] and (2) Diamond admits that it considered Miller's and Munoz's union activities in placing them. Maj. Op. at 1263.

The majority's conclusion, however, conflicts with the court's unanimous conclusion that the General Counsel failed

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acknowledgment is insufficient to establish a *prima facie* case unless Diamond's actions also had an adverse effect on protected activity. Whether Diamond's placement of the returning strikers in fact had an adverse effect is vigorously disputed by Diamond. Diamond argues that "the adverse effect of placing the . . . strikers in two of the largest departments in the plant, *if any*, was comparatively slight." Pet'r Opening Br. at 25 (emphasis added). Diamond then detailed why the adverse effect *if any* of the placement of the returning strikers would be comparatively slight:

> The jobs to which [the returning strikers] were assigned were not inferior or substandard ones. They were right in the mainstream of the plant, in the two biggest departments. More replacement workers held the very same positions given to the strikers than any other positions in the plant. These were not humiliating or difficult jobs in which the strikers were placed; they were the most common and easy jobs in the plant.

Id.

3. The majority characterizes the jobs Miller and Munoz received as "objectively" less desirable than the jobs they claim they should have been given. Maj. Op. at 1263. I take this characterization to be based solely on the wage differential between the respective jobs inasmuch as the majority mentions no other factors supporting its assessment of "objective" desirability.

to establish a *prima facie* case of discrimination with respect to Kussair because the two factors the majority uses to establish discrimination apply equally to Kussair.[4] The loader position Kussair claimed he should have been given paid more than the position in which he was placed and, as Diamond concedes, in placing Kussair it considered his union activity. Pet'r Opening Br. at 20. Thus the combination of known (and considered) union activity and a lower paying job cannot be sufficient to establish *prima facie* discrimination here because, as we all agree, Diamond did not discriminate against Kussair.

The inconsistency between the majority's treatment of Kussair on the one hand and Miller and Munoz on the other results from its incomplete statement of the law on what constitutes a *prima facie* case. The majority opinion states that under *Fleetwood* the General Counsel could establish a *prima facie* case here if "the employer's decision as to how to treat the three returning strikers was attributable to their protected activity." Maj. Op. at 1263. That, however, is only part of the story. The *Fleetwood* framework for evaluating discrimination in the context of striker reinstatement is drawn directly from the Supreme Court's general explication of section 8(a)(3) discrimination in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545-

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4. The majority intimates that it does not conclude anything with respect to Kussair but rather simply reinstates the panel judgment. Maj. Op. at 1263 n.2. But the majority's statement that the panel's disposition of Kussair is not before the *en banc* court — based on the fact that *the Board* did not seek rehearing on Kussair — is incorrect because *the intervenor Unions* sought rehearing *en banc* on the panel's entire decision, including its decision as to Kussair. *See* Intervenors' Pet. for Reh'g and Suggestion for Reh'g En Banc at 2. We granted the suggestions of both the Board and the Unions, 88 F.3d 1064 (D.C.Cir.1996); accordingly, the panel's disposition of Kussair is before the *en banc* court.

46, 19 L.Ed.2d 614 (1967) (citing *Great Dane*). Under *Great Dane* the fact that an employer considers protected activity in its treatment of employees is not sufficient to constitute unlawful discrimination under the Act. Rather, employer conduct constitutes unlawful discrimination under section 8(a)(3) only if there is "discrimination *and* a resulting discouragement of union membership." *Great Dane*, 388 U.S. at 32, 87 S.Ct. at 1796 (emphasis added) (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965)).[5] Furthermore, whether an employer's action discourages union membership is a necessary element of the General Counsel's *prima facie* case. *See id.* at 34, 87 S.Ct. at 1797-98 (burden shifts to employer "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent") (emphasis in original).[6]

On this record the General Counsel failed to establish that Diamond's placement of Miller and Munoz could have adversely affected employee rights to *any* extent. The Board failed even

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5. Similarly, the statute itself forbids only discrimination that "*discourage[s]* membership in any labor organization." 29 U.S.C. § 158(a)(3) (emphasis added). Although not relevant here, the statute also prohibits discrimination that encourages union activity. *Id.*

6. There is also an animus aspect to the discouragement of union membership. Even if employer conduct could discourage union membership, the conduct is not unlawful under the Act unless the employer acted with the purpose of discouraging union membership. Employer animus, however, does not form a part of the General Counsel's *prima facie* case. *See Great Dane*, 388 U.S. at 33-34, 87 S.Ct. at 1797-98. Instead, the General Counsel need only produce evidence of animus if the employer's conduct is not "inherently destructive" of employee rights and only after the employer has come forward with evidence of a legitimate and substantial business justification to rebut the General Counsel's *prima facie* case. *Id.*

to reach the issue and its order should not be enforced on that ground alone. *See* JA 17 (concluding a *prima facie* case had been established solely on the basis of the General Counsel's contention that Miller, Munoz and Kussair were placed "because of their union status and/or because of certain protected union activity they engaged in while on strike"). Similarly, the majority never addresses the question whether Diamond's actions could have discouraged union membership or participation in the strike.[7] *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233, 83 S.Ct. 1139, 1148, 10 L.Ed.2d 308 (1963) (Discouragement of union membership "includes discouraging participation in concerted activities . . . such as a legitimate strike." (citation omitted)). In many cases whether union members have received different treatment and whether there is a resulting discouragement of union membership collapse. In this case the majority relies on the fact that Diamond considered union activity in placing Miller and Munoz in positions that paid less than other positions for which they were qualified. The distance between being paid less because of protected activity and being discouraged from that protected activity may be short. Nonetheless, neither the General Counsel nor the Board nor the majority opinion even tries to make the journey.[8]

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7. Although unstated, this may be the factor upon which the majority distinguishes Kussair from Miller and Munoz. In other words, because Kussair was given a less onerous job and Diamond agreed to transfer him upon request, it would be difficult to conclude that Diamond's placement of Kussair could have adversely affected employee rights. I think this is precisely the rationale that should be used to explain the lack of a *prima facie* case with respect to Kussair. As explained *infra*, the same "missing link" defeats the General Counsel's *prima facie* case regarding Miller and Munoz.

8. *Fleetwood* (a failure to rehire case) is itself a good example of a case where the questions of differential treatment and discouragement of

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In determining whether Diamond's placement of the returning strikers could have discouraged protected activity, we must examine more than the differing wages as the majority has done.[9] Comparing the positions offered to Miller and Munoz to the positions they claim they should have been given, I fail to see how it can reasonably be thought that Diamond's placement of them could have discouraged protected activity. Miller and Munoz (and Kussair) crossed the picket line as union agents for

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protected activity collapse. *Fleetwood* declares simply, "If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights. . . ." 389 U.S. at 378, 88 S.Ct. at 546. There was, without doubt, discouragement on the *Fleetwood* facts. This case, however, is not a failure to rehire case and for that reason, among others, the question of discouragement is more difficult.

9. It would be proper to focus exclusively on wages when, for example, an employer placed returning strikers in positions and paid them less than it was paying replacement workers for the same positions. That would constitute discrimination under the Act and would also result in discouragement of protected activity. The question in this case, however, is different. The alleged discrimination is not only the payment of a lower wage but also the discriminatory placement of a returning striker in one position rather than another. To determine whether that placement is discriminatory it is necessary to compare the position the returning striker received with the position the returning striker claims he should have received. Even when we look at wages in this case, the differentials may not have been enough to discourage protected activity. The record is ambiguous regarding how much Munoz would have earned in the forklift position, stating that it would have been between $2.50 and $5.00 more per hour. As for Miller the job she claims she should have received paid 32 cents more per hour. Assuming a forty hour work week, during the two weeks Miller returned to work she grossed approximately $25 less than she would have in the quality assurance position.

the declared purposes of campaigning and monitoring Diamond's pre-election activity. Also, their Union, through William Freitas, the Union official who accompanied the delegation of returning strikers, instructed Diamond that any communications between Diamond and Miller, Munoz and Kussair had to go through the Union rather than directly with the returning strikers. In short, Miller and Munoz returned to campaign — not simply to earn a living. Accordingly, an important, if not the most important, feature of their respective positions was proximity to replacement workers. Diamond contends that "because the striking workers were coming back in part at least to campaign, . . . we tried to put them in departments where a lot of people worked and that they had access to being with those people and . . . weren't isolated." JA 122 (testimony of Daniel O'Connell, Diamond's vice-president of operations). Accordingly, Diamond placed Miller in the largest department of the plant, containing about 75-80 people, JA 131-32, and Munoz in the second largest department, containing about 50 people, JA 270.

By contrast, the jobs that Miller and Munoz claim Diamond should have placed them in provided less contact with replacement workers. The forklift position Munoz claims she should have received would have meant that "in most cases" she would have been "on [her] own." JA 143 (testimony of Daniel O'Connell). Likewise, the quality assurance position that Miller says she should have been placed in required "quite a bit of unsupervised, unobserved freedom." JA 135 (testimony of Daniel O'Connell).[10] In light of both the strikers' dual purposes in

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10. Although O'Connell's testimony that Miller would have been "unobserved" if in the quality assurance position and Munoz would have been "on her own" in the forklift position was given in the context of Diamond's fears of sabotage, the testimony is nonetheless relevant in

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returning and their dual capacities as employees and union agents, the General Counsel failed to establish discrimination that could discourage union membership by Diamond's placement of Miller and Munoz in positions that were plainly advantageous to them (and to their union). And to the extent this may be a close call, we do not owe deference to the Board because there is nothing to defer to — the Board failed even to discern the issue of discouragement.

But there is little need to speculate about the relative desirability of the positions in which Miller and Munoz were placed and those which they *now* claim they should have been given. We need only look at Miller's and Munoz's own actions. Miller and Munoz never requested particular jobs nor asked for transfers once Diamond had placed them. While an employee bears no burden to apply for a certain position or to request a transfer (and concedes no rights under the Act by failing to do so), when he fails to do so, his inaction may at least suggest that the position he has been given is *not* in fact less desirable.

More important, the Union never objected to the placement of the workers until after the election. When there is no timely objection to the employer's action, the majority's finding of discrimination solely on the basis of one term of employment — here a small differential in wages — places an intolerable burden on employers. Its approach allows a union that has lost an election (or, as here, two elections) to comb the record after

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this context as well. If Miller and Munoz had been unobserved by other workers in the positions they claim they should have been given, they would have been unable to lobby replacement workers and monitor Diamond's actions in the preelection period as well as they could in the two largest departments in the plant where Diamond placed them.

the fact to find an available job with some preferential term that a returning striker was not given — despite the employer's lack of notice of the preference — and then claim discrimination. For example, had Miller and Munoz been placed in the quality assurance and forklift positions, they then most likely would have claimed discrimination from being isolated from the replacement workers. Indeed, the Board has found on several occasions that transferring an employee to an isolated spot constitutes discrimination under the Act. *See, e.g., Inductive Components, Inc.*, 271 N.L.R.B. 1448, 1469, 1984 WL 36761 (1984); *Tappan Co.*, 228 N.L.R.B. 1389, 1390-91, 1397, 1977 WL 8540 (1977), *enforced on other issue, NLRB v. Tappan Co.*, 607 F.2d 764 (6th Cir.1979); *Fabric Mart Draperies, Inc.*, 182 N.L.R.B. 390, 395-96 (1970). In sum, the majority's willingness to find a *prima facie* case solely on the placement of a returning striker in a position that does not compare favorably in a single aspect with another available position leaves even the best-intentioned employer with little or no guidance on how to assign returning strikers without running afoul of the Act. I conclude that the General Counsel failed to establish a *prima facie* case with respect to Miller, Munoz and Kussair.

II.

Even if the General Counsel did establish a *prima facie* case with respect to Miller and Munoz, Diamond had a legitimate and substantial business justification for placing both workers where it did and therefore did not violate the Act under *Fleetwood*. Diamond feared that the returning strikers could engage in product tampering or sabotage or otherwise disrupt its operation. Miller and Munoz had already participated in a well-publicized cross-country tour urging a national Diamond boycott, a campaign dramatically disparaging Diamond's

product. Strikers on the tour distributed leaflets charging that Diamond had hired unqualified replacement workers who allowed contaminated and inedible walnuts — with mold, dirt, oil, worms and debris — to be marketed.[11] Besides its fear that Miller and Munoz might try to make the charges ring true (e.g., by adulterating Diamond's product), Diamond knew Miller's and Munoz's track record of attempting to damage Diamond economically. Consequently Diamond was concerned that once inside the plant the activists could wreak economic havoc by delaying production or otherwise disrupting its operation during peak season.

In concluding that Diamond had a legitimate and substantial business justification for putting Miller in the packing position, the majority rejects the assertion that an employer can have a justification based on sabotage only if there have been specific

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11. In addition, Diamond's customers and, it appears, the United States Department of Health and Human Services received a letter including the following (false) message:

> Many of the workers that have actually replaced *us, the striker's [sic] of Diamond Walnut,* are people whom [sic] have police records as being drug addicts, drug dealers, alcoholics and even prostitutes. Through blood testing of workers who have broken the picket line, many of them having bad records, it would be found that there is a significant amount of positive results like the detection of the AIDS virus, Sifillis [sic], Gonorrea [sic], Hepatitis and other contagious diseases with high risk of contamination to the public.

JA 401-02 (emphasis added). Notwithstanding the highlighted language as well as the signature line which read "The Original and United Workers of Diamond Walnut," the Union disavowed responsibility for the letter and the ALJ gave it no weight.

threats from the returning strikers themselves.[12] Rather, the majority accepts that Miller's participation in protected activity that disparaged Diamond's product justified discriminatory placement because "[b]oth the risk Diamond faced in its placement of Miller was qualitatively different than a normal risk of sabotage, and the deterrence to Miller's possible misbehavior was peculiarly inadequate." Maj. Op. at 1269.

The problem with the majority's handling of Miller is that it is inconsistent with the majority's conclusion that Diamond lacked a legitimate and substantial business justification regarding Munoz. Diamond's concern that Munoz might cause damage while driving the forklift forms only part of Diamond's

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12. Judge Wald characterizes this result as a "remarkable innovation in labor management law" that "establishes a dangerous precedent that will be readily embraced by employers and will critically erode employees' statutory rights under the NLRA," Wald Op. at 1270. Judge Wald's prediction, and her suggestion that employers henceforth may be able to avoid rehiring all returning strikers in every labor dispute, *id.* at 1276, plainly exaggerates the potential effect on employee rights because it fails to fit the employer's business justification into the *Fleetwood* framework. A finding that an employer has a legitimate and substantial business justification does not end the inquiry under *Fleetwood*. Even if an employer has such a justification, a violation of the Act can still be established through "specific evidence of a subjective intent to discriminate or to encourage or discourage union membership." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227, 83 S.Ct. 1139, 1145, 10 L.Ed.2d 308 (1963). Moreover, proof of antiunion motivation may be made by way of circumstantial evidence. *See Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C.Cir.1991). Although neither the General Counsel nor the Unions were able point to a shred of evidence (direct or circumstantial) of animus here, not every strike case will be so barren. Finally, for employer conduct that is "inherently destructive" of employee rights, the majority's holding is of little import. For that class of cases, the Board can infer antiunion motivation irrespective of a legitimate and substantial business justification. *See Great Dane*, 388 U.S. at 34, 87 S.Ct. at 1797-98.

asserted business justification for placing Munoz where it did. Just as with Miller, Diamond was concerned that Munoz, as a forklift operator, could engage in sabotage by adulterating Diamond's product. Pet'r Opening Br. at 39 (forklift driver "could easily . . . mix a harmful substance in with the walnuts").[13] As for the likelihood that Munoz would commit the sabotage, there was no greater disincentive for Munoz than for Miller. As a forklift driver Munoz would have had access to the finished product without any supervisors present. Although the majority opinion concludes that the possibility of Munoz's adulterating the product was an "ancillary concern," Maj. Op. at 1264 n.4, the record does not support that characterization. Indeed, when asked whether forklift operators have access to the finished product, Diamond's vice-president of operations responded:

> In many, many cases they do. Depending upon the area that they work in, much of their access is to the finished product. They're expected to put it away or retrieve it for shipment or move it from one department to another. Finished product can be in a box. It could also be in a metal or wooden bin in which its [sic] finished processing and ready to go into a container. And that's just as even — *that's perhaps even more susceptible to any type of contamination or some type of foul play.*

JA 143-44 (emphasis added).[14] It appears, then, that the only

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13. Diamond raised the identical concern before the Board, *see* Employer's Br. in Support of Limited Exceptions to the Decision of the Administrative Law Judge at 34 (No. 32-CA-13467), and before the panel. *See* Pet'r Opening Br. to the Panel at 36.

14. The majority's suggestion that I have attached more importance

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distinction between Miller and Munoz is that Miller could have engaged in sabotage through nonfeasance by allowing an inferior product to pass by her while Munoz would have had to act affirmatively by, for example, placing an impurity in the product. This is too fine a point to put between conduct that violates the Act and conduct that does not.[15] First, what constitutes misfeasance as opposed to nonfeasance is difficult to define. If a quality control worker has a duty to remove impurities and deliberately fails to do so, is the failure nonfeasance or misfeasance? Second, the distinction would require employers, the Board and reviewing courts to assess the relative risks of a returning striker who simply ignores product impurities and one who affirmatively adulterates the product. Such inquiries are likely to send all involved down the road of groundless speculation.

* * *

The majority opinion draws distinctions among Miller, Munoz and Kussair (resulting in treatment under three different legal rationales) that are not supported by the record. I believe

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to this matter than is warranted in light of Diamond's failure to "emphasize" this point, Maj. Op. at 1265 n.5, is troubling. Apparently, it is not enough to unequivocally make an argument, as Diamond has done here, *see* Pet'r Opening Br. at 39, but now the party must also "emphasize" each argument. The likely effect of the majority's standard on the verbosity of future briefs to this court is not difficult to discern.

15. Munoz's "nonfeasance" could also have caused different, but substantial, economic damage to Diamond. The strikers returned during Diamond's peak season and a lackadaisical forklift driver could have prevented Diamond from meeting tight shipping deadlines. JA 245-46.

that the General Counsel failed to make a *prima facie* case of discrimination with respect to any one of the three. In the alternative, I would find that Diamond had a legitimate and substantial business justification for its placement of Miller and Munoz and did not discriminate against Kussair. Accordingly, I concur in the majority's result regarding Miller and Kussair and I dissent from its holding as to Munoz.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JULY 11, 1996

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Cannery Workers, Processors, Warehousemen and Helpers, Local 601 and International Brotherhood Of Teamsters,

Intervenors.

No. 95-1075.

United States Court of Appeals,
District of Columbia Circuit.

July 11, 1996.

Prior report: 80 F.3d 485.

Before: EDWARDS, Chief Judge, and WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

ORDER

PER CURIAM.

Appendix C

The Suggestions for Rehearing *In Banc* of respondent and intervenor and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestions are granted. It is

FURTHER ORDERED, by the court *in banc*, that the judgment of the court filed herein on March 29, 1996 is vacated.

A future order will govern further proceedings.

APPENDIX D — ORDER DENYING PETITIONS FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JULY 11, 1996

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Cannery Workers, Processors, Warehousemen and Helpers, Local 601 and International Brotherhood Of Teamsters,

Intervenors.

No. 95-1075.

United States Court of Appeals,
District of Columbia Circuit.

July 11, 1996.

Prior report: 80 F.3d 485.

Before WALD, SENTELLE and HENDERSON, Circuit Judges.

ORDER

PER CURIAM.

Appendix D

Upon consideration of the petitions for rehearing filed by respondent and intervenors, and of the response thereto, it is

ORDERED that the petitions be denied.

WALD, Circuit Judge, would grant the petitions.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED MARCH 29, 1996

DIAMOND WALNUT GROWERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

Cannery Workers, Processors, Warehousemen and Helpers, Local 601, and International Brotherhood of Teamsters, AFL-CIO,

Intervenors.

No. 95-1075.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 17, 1995.

Decided March 29, 1996.

* * *

Before: WALD, SENTELLE and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

Appendix E

Opinion dissenting in part and concurring in part filed by Circuit Judge WALD.

KAREN LECRAFT HENDERSON, Circuit Judge:

Amidst a bitter economic strike and at the union's direction, a small group of striking union activists crossed the picket line and temporarily returned to work, within days of a rerun representation election, for the announced purposes of campaigning for the union among replacement workers and monitoring the employer's pre-election conduct. In deciding which jobs to give the crossovers, the employer took into account the risk that they could be drawn into potentially violent confrontations with replacement workers as well as the risk that they could engage in production tampering or sabotage or otherwise disrupt the employer's business operation. The National Labor Relations Board (Board) found that the employer had committed an unfair labor practice by discriminatorily assigning the returning strikers to positions that paid less than available ones for which they were qualified, the employer having failed to establish a legitimate and substantial business justification for the job assignments it made. Accordingly, the Board ordered the employer to make the strikers whole. It also ordered that the scheduled rerun election be run yet again. We disagree and grant the employer's petition for review.

I. Background

A.

Diamond Walnut Growers, Incorporated (Diamond) processes and packages walnuts at its plant in Stockton, California and then ships them to national and international

markets. The work force consists of permanent year-round employees supplemented by seasonal hires during the harvesting season in September and October. For decades Diamond voluntarily recognized Cannery Workers, Processors, Warehousemen & Helpers Local 601 of the International Brotherhood of Teamsters (Union) as the employees' representative and had a collective bargaining agreement with the Union, the most recent one expiring in June 1991. In September 1991, the start of the peak season, nearly 500 permanent and seasonal employees struck without notice. In response to the economic strike Diamond hired replacement workers, most of whom remain Diamond employees today. The well-publicized strike was marked by violence as well as Union-led campaigns to boycott Diamond both in the United States and abroad.

About a year into the strike a representation election was held to determine whether to certify the Union as the employees' exclusive representative. The Union lost the election decisively and then filed objections, prompting the Board to order that a rerun election be held on October 7-8, 1993. The case centers on Diamond's conduct immediately preceding the rerun election.

B.

On the morning of September 20, 1993, seventeen days before the scheduled rerun election, a group of Union supporters arrived at the plant's main gate without notice. The group consisted of several striking Union activists led by William Freitas, a Union official. The group was escorted to a meeting with Vince Brown and Wendy Heinze, two members of Diamond's management. Freitas began the meeting by handing to Brown and Heinze a letter from the Union lawyer which stated in relevant part:

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> Several of the strikers share the Union's conviction that because of Diamond management's blind determination to break the Union . . . a fair election is simply impossible at this point.
>
> Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers . . . have an opportunity to hear from Union sympathizers, an opportunity denied them last year because few worked with them or attended the mandatory employee meetings in which management personnel campaigned.
>
> Accordingly, the [four] strikers listed below have decided to cease their strike-related activities and have authorized me to inform you that effective upon delivery of this letter, they are available and willing to return to immediate active employment. . . .

Joint Appendix (JA) 704-05. Brown explained that only seasonal positions were available and that the returning strikers, like earlier crossovers, must sign a release form. Freitas said he had to consult with the Union lawyer to see if the form was acceptable. Freitas also instructed Brown and Heinze that all communication between Diamond and the four returning strikers was to be conducted through the Union. Later that afternoon Diamond received by courier executed release forms from three of the four strikers, including Willa Miller. The following day the Union notified Diamond by letter that, pursuant to the above-quoted letter from the Union lawyer, strikers Alfonsina Munoz and Mohammed Kussair also were willing to return to work.

The Union's pre-election strategy placed Diamond in a difficult position. Operating at its peak season, Diamond faced

the prospect of Union-sponsored activists temporarily returning to work shortly before a representation election, not to earn a paycheck, but to campaign and monitor. Diamond was concerned for the safety of both the Union activists and the replacement workers: During the strike replacement workers had been the targets of violence, vandalism and threats and the replacements had openly expressed their resentment and hostility toward the Union and its striking members. In addition, Diamond was concerned that the Union activists might try to sabotage the plant, tamper with its product or otherwise disrupt its operation: The Union had engaged in an international boycott campaign to damage Diamond economically, a campaign which involved not only criticism of Diamond but disparagement of its product as contaminated and unfit to eat (*e.g.*, Union activists had distributed a leaflet stating that Diamond was "looking the other way" while "scabs" packaged walnuts with mold, dirt, oil, worms and debris).

Diamond agreed to let the Union activists return to work even though the strikers had no right to reinstatement under the National Labor Relations Act (Act) in that neither their former positions nor substantially equivalent ones were available.[1] *See Rose Printing Co.*, 304 N.L.R.B. 1076, 1991 WL 197152 (1991). But in light of its concerns Diamond decided to place the returning strikers — none of whom requested a specific job assignment — in non-sensitive positions, *i.e.*, positions that were well supervised, not isolated and did not allow them to move

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1. Before striking, Miller was a quality control supervisor, Munoz drove a lift truck and Kussair operated an air separator machine. All three jobs were permanent but were not available in September 1993. Although a *seasonal* lift truck driver job was available when Munoz returned, the seasonal job was not substantially equivalent to the permanent one. *Diamond Walnut Growers, Inc.*, 316 N.L.R.B. 36, 37, 1995 WL 25644 (1995).

around the plant during work hours. Accordingly, the company decided to assign Miller to a seasonal packing position (filling cases with packages of walnuts weighing less than one pound each) and Munoz and Kussair to seasonal positions in the growers' inspection department (cracking and inspecting nuts at the front end of the production process). Their jobs were supervised and required them to remain in their work areas. Only Kussair complained about his placement. He asked to be reassigned as a loader but then quit before Diamond could transfer him.

When the strikers returned to the plant they carried on their campaigning and monitoring and reported their activities and observations to Union officials and to the Union lawyer — after each shift, according to Miller.

The representation election took place as scheduled on October 7-8 and once again the Union lost. After casting their ballots Miller, Munoz and Kussair, who had intended all along to return to the strike after the vote,[2] submitted identical form letters of resignation drafted by the Union lawyer and rejoined the strike.[3]

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2. At the hearing below, Kussair was asked, "And did you know when you went to work inside the plant that you would only work up until the vote and then you'd go back on strike." He answered in the affirmative. *Diamond Walnut Growers, Inc.*, Transcript of March 1994 Hearing Before Administrative Law Judge, at 241. Munoz likewise was asked, "And was it your understanding you were only going to go in for a limited time period and then quit when the vote happened?" She answered in the affirmative. *Id.* at 218. Apparently Miller was not asked the question but the Board does not contend that she had any intention of remaining past the election.

3. Each resignation letter stated: "This is to inform you that I have (Cont'd)

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C.

After the election the Board's General Counsel filed a complaint alleging that Diamond had engaged in unfair labor practices in the pre-election period, namely that Diamond had violated sections 8(a)(3) and 8(a)(1) of the Act by failing to assign Miller, Munoz and Kussair to certain *seasonal* positions for which they were qualified: Miller as a quality control assistant, Munoz as a lift truck driver and Kussair as a loader.[4] After a hearing the administrative law judge (ALJ) found that the General Counsel had failed to establish a prima facie case of discrimination because Diamond was not obligated to reinstate the strikers. The ALJ, quoting *Rose Printing*, 304 N.L.R.B. at 1076, declared that " 'an employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers [sic] former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform.' " JA 25.

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decided to resume the strike against Diamond effective immediately. Working here over the past couple of weeks has convinced me that conditions have significantly deteriorated and I must continue the Union's efforts to bring decency and respect to the long-term workers of Diamond. Henceforth I will not be crossing the picket lines." JA 712.

4. Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to . . . discourage membership in any labor organization" 29 U.S.C. § 158(a)(3). Section 8(a)(1) makes it an unlawful labor practice "to interfere with, restrain or coerce employees in the exercise" of their statutory rights. 29 U.S.C. § 158(a)(1). A violation of section 8(a)(3) automatically constitutes a violation of section 8(a)(1). *International Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 761 (D.C.Cir.1988).

The Board reversed. *Diamond Walnut Growers, Inc.*, 316 N.L.R.B. 36, 1995 WL 25644 (1995). The Board found that Diamond had discriminated against Miller, Munoz and Kussair because, although the company "was under no legal obligation . . . to reinstate the strikers . . ., once it voluntarily decided to reinstate them, it was required to act in a nondiscriminatory fashion toward the strikers." *Id.* at 38. The Board further found that Diamond had failed to establish a substantial and legitimate business justification for its action. The Board ordered Diamond to make Miller, Munoz and Kussair whole for any losses suffered and to post a remedial notice. The Board also set aside the October 1993 election and ordered yet another rerun election, which has yet to take place. Diamond petitions for review and the Board cross-petitions for enforcement of its order.

II. Legal Standards

Workers have a statutory right to organize and strike, 29 U.S.C. §§ 157, 163, and an economic striker retains his status as an employee so long as he has not obtained any other equivalent work. *Id.* § 152(3). An economic striker who tenders an unconditional offer to return to work has a right to reinstatement only if a vacancy exists in his former position or a substantially equivalent one; he does not have a right to reinstatement to any other job for which he may be qualified. *See generally Rose Printing Co.*, 304 N.L.R.B. at 1076-78. Although an employer has no obligation to reinstate an economic striker to a vacant job that is not substantially equivalent to his former job, the striker nevertheless is entitled to nondiscriminatory treatment when he applies for any job for which he is qualified; an employer cannot prefer a new applicant to the striker solely because the latter went on strike and continues to support the union. *Id.* at 1078; *see also Laidlaw*

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Waste Sys., Inc., 313 N.L.R.B. 680, 681, 682, 1994 WL 57456 (1994).

An employer's discriminatory treatment of former strikers may have either a "comparatively slight" or "inherently destructive" effect on employee rights. *Boilermakers Local 88*, 858 F.2d at 761-62. The Board appears to concede that Diamond's conduct had at most a comparatively slight adverse effect on protected activity.[5] In a "comparatively slight" case the employer must establish a legitimate and substantial business justification for its conduct in order to avoid an unfair labor practice charge. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545-46, 19 L.Ed.2d 614 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1797-98, 18 L.Ed.2d 1027 (1967). If the employer can do this, the General Counsel must then affirmatively establish that the employer's conduct was motivated primarily by an anti-union animus. *Fleetwood*, 389 U.S. at 380, 88 S.Ct. at 546-47. *Great*

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5. The Board argues:

> The Company erroneously asserts that the Board found its placement of Miller, Munoz and Kussair to be conduct "inherently destructive" of statutory rights. . . . The Board, however, never determined the Company's conduct to be "inherently destructive". . . . As shown above, the Board's theory here is simply that the Company discriminated against the former strikers in considering them for vacancies and failed to provide any legitimate and substantial business justification.

Brief for Board at 26 (citations omitted). There is no indication of record that the replacement workers knew the jobs Miller, Munoz and Kussair held before they struck and therefore the replacements had no reason to believe the returning strikers were being treated discriminatorily based on their pro-Union actions.

Dane, 388 U.S. at 34, 87 S.Ct. at 1797-98. We do not disturb the Board's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e).

III. Substantial and Legitimate Business Justification for Placement of Miller and Munoz

In response to the General Counsel's charge of unlawful discrimination, Diamond argued that it was justified in its placement of Miller and Munoz because of the unusual circumstances of their return and the risks their return raised. As discussed below, the record allows for only one reasonable conclusion: Diamond established substantial and legitimate business justifications for Miller's and Munoz's job assignments.

A.

We first emphasize what this case does *not* present. This is not a failure-to-reinstate case. Nor is it a case involving retribution for strike-related conduct; nor is it about the treatment of a former striker who either seeks reinstatement after the strike is over or withdraws his support of the strike and crosses the picket line in order to earn a living. Rather, the case involves an employer's accommodation of striking union activists who, at the union's direction and with the union lawyer's guidance, sought to return to work temporarily — during the employer's peak season, in the midst of an ongoing strike and shortly before a second representation election — in order to persuade replacement workers to support the union and to monitor the employer's pre-election conduct.

With the strike ongoing and the second election imminent,

Diamond was greeted by, in the ALJ's words, a "union delegation" made up of activists led, not by a local official, but by an official of the International Brotherhood of Teamsters. JA 22. They handed Diamond management a letter from the Union lawyer giving notice that the activists wanted to cross the picket line to campaign for the Union among replacement workers. Diamond was directed not to communicate directly with the Union emissaries (Diamond's own employees); instead all communications were to go through the Union. The Union lawyer was omnipresent: he drafted the letter, approved Diamond's release form, received reports after the activists returned to work and prepared the form letters of resignation they submitted after casting their votes. In short the returning strikers and the Union spoke with one voice. From the perspective of a reasonable employer in Diamond's shoes the strikers sought temporary access to the work place, and work force, as Union envoys, albeit "employees" within the meaning of the Act. *Cf. NLRB v. Town & Country Elec., Inc.*, __ U.S. __, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) (holding that worker can be "employee" within Act notwithstanding union's simultaneous "employment" of worker to help organize company).[6]

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6. Judge Wald reads far too much into *Town & Country*. *See* Opinion dissenting in part and concurring in part at 7-9. There the Supreme Court simply confirmed what this Court had previously held in *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1330-31 (D.C.Cir.1992), *cert. denied*, 507 U.S. 909, 113 S.Ct. 1252, 122 L.Ed.2d 651 (1993): A paid union organizer can be an "employee" protected by the Act. No one disputes that Miller and Munoz were "employees" protected by the Act. The issue here is, given their status as "employees" protected by the Act's anti-discrimination provision, did Diamond have a legitimate and substantial justification for the job assignments it gave them? In *Town & Country*, moreover, the employer raised the risk of sabotage not to assert a *Fleetwood* defense but to argue that "Congress could not have meant

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Further, the strikers did not cross the picket line to earn a paycheck. For one thing, from the beginning the strikers did not intend to remain past the election. *Supra* note 2. For another, the letter Diamond received from the Union delegation made clear the purpose of their return: so that replacement workers could "have an opportunity to hear from Union sympathizers." Indeed, a local newspaper (*The Stockton Record*) contemporaneously ran a story entitled, "Diamond strikers to lobby for union vote." JA 672. The story opened with this description of the event: "With a crucial vote on union representation just over two weeks away, three striking Diamond Walnut workers will be going back to work . . . to keep tabs on the company's campaign tactics and urge replacement workers to vote to keep the union." In that story a Teamsters strike coordinator, who equated the returning strikers to "Daniel going into the Lion's den," described the purpose of their return: "[W]e [the Teamsters] feel that we need people who can monitor the company's conduct during the election and present the union's side to the replacement workers." *Id.*

From Diamond's perspective the return of the Union activists — immediately before a representation election which threatened the replacement workers' continued employment — presented a high risk of unrest if not renewed confrontation. Strikers had previously physically assaulted replacement

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paid union organizers to have been included as 'employees' under the Act." __ U.S. at __, 116 S.Ct. at 456. Indeed, the Supreme Court declined to "express any view about . . . whether or not [the employer's] conduct (in refusing to interview, or to retain, 'employees' who were on the union's payroll) amounted to an unfair labor practice." *Id.* at __, 116 S.Ct. at 457 ("We hold only that the Board's construction of the word 'employee' is lawful. . . .").

workers, verbally attacked and threatened them and vandalized their property, including their residences. *See Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 64-66, 1993 WL 356124 (1993) (detailing incidents occurring earlier during strike and noting that restraining orders had issued against both strikers and replacements). In turn replacement workers had posted in the plant placards critical of the Union and its strikers. Vince Brown, Diamond's Director of Human Resources and one of the officials who decided where to place the returning strikers, testified that, on learning of the return of the Union activists, the replacements were angry and made comments like, "[G]ee, what happened if they fell down in the rest room or in the locker room" and "Boy, I bet you won't send them back to bulk storage." JA 200. Replacement worker Sonja Bubeck testified that her fellow replacements resented the strikers, especially those who came to the plant to campaign for the Union. In fact, Bubeck urged replacement workers to remain calm.[7]

Diamond further feared that the returning strikers could engage in product tampering, sabotage or otherwise disrupt the company's operation. Miller and Munoz had already participated

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7. In a letter to "fellow co-workers" regarding the return of the Union activists, Bubeck stated in part:

> They [strikers] have threatened us — Intimidated us — Called us every name in the book — And even destroyed our property . . . But . . . Let's not stoop to their level of immaturity. They may still say things that piss you off; but ***PLEASE*** for the sake of all of our futures here at Diamond Walnut let's keep cool and levelheaded in our everyday dealings with these people.

JA 278 (emphasis in original).

in a well-publicized cross-country tour urging a national Diamond boycott, a campaign dramatically disparaging Diamond's product. Strikers on the tour distributed leaflets charging that Diamond had hired unqualified replacement workers who allowed contaminated and inedible walnuts — with mold, dirt, oil, worms and debris — to be marketed.[8] Besides its fear that Miller and Munoz might try to make the charges ring true (*e.g.*, by adulterating Diamond's product), Diamond knew Miller's and Munoz's track record of attempting to damage Diamond economically. Consequently Diamond was concerned that once inside the plant the activists could wreak economic havoc by delaying production or otherwise disrupting its operation during peak season.

To sum up, Diamond faced multiple risks in deciding whether to reinstate the strikers, employees who, as the Board

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8. In addition, Diamond's customers and, it appears, the United States Department of Health and Human Services received a letter including the following (false) message:

> Many of the workers that have actually replaced *us, the striker's [sic] of Diamond Walnut,* are people whom [sic] have police records as being drug addicts, drug dealers, alcoholics and even prostitutes. Through blood testing of workers who have broken the picket line, many of them having bad records, it would be found that there is a significant amount of positive results like the detection of the AIDS virus, Sifillis [sic], Gonorrea [sic], Hepatitis and other contagious diseases with high risk of contamination to the public.

JA 374-75 (emphasis added). Notwithstanding the highlighted language as well as the signature line which read "The Original and United Workers of Diamond Walnut," the Union disavowed responsibility for the letter and the ALJ gave it no weight.

concedes, had no statutory right to reinstatement in that neither their former positions nor substantially equivalent ones were available. And Diamond had a substantial and legitimate interest in minimizing the risks. To that end the company placed Miller and Munoz in supervised positions (a supervisor could defuse a violent incident) that did not allow them to roam about the plant but that nonetheless gave them access to replacement workers (they could approach replacement workers during breaks or in their own work areas). Although Miller was qualified to fill a vacancy in the quality control department, Diamond had a legitimate reason not to place her there: quality control involved inspecting nuts for defects, the final step in the production process before shipping. An unenthusiastic or inattentive worker there could allow defective or contaminated nuts to be marketed or, worse, deliberately adulterate the product. As for Munoz, although she was qualified to fill a vacancy as a lift truck driver, Diamond legitimately decided not to put her behind the wheel of the 11,000-pound vehicle. Not only did the lift truck driver move about the plant unsupervised, the truck itself, with an inattentive operator, could cause damage inside the plant. In addition, because the lift truck was an integral part of a production process that was constrained by tight shipping schedules, an inattentive operator could cause production delay.

Viewing the totality of the circumstances of record, we conclude that Diamond established substantial and legitimate business justifications for its placement of Miller and Munoz. In so concluding, we note the Board's reasoning in *Sunland Constr. Co., Inc.*, 309 N.L.R.B. 1224, 1992 WL 390105 (1992):

> In our experience, when a company is struck it is not "business as usual." The union and the employer are in an economic battle in which the union's

> legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production. . . . Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. . . . Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

Id. at 1230-31.[9]

B.

The Board painted a different, and incorrect, picture. First, it emphasized the lack of evidence that Miller, Munoz and Kussair personally had attacked or harassed replacement workers or that the replacements were more resentful of Miller, Munoz and Kussair than of other strikers. We do not agree that such

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9. In *Sunland* the Board emphasized that the agent was paid by the union. 309 N.L.R.B. at 1231 n. 41. If the returning worker is not on the union's payroll, the Board noted, "it cannot necessarily be presumed that [he] will be seeking to further the union's object of depriving the employer of employee services during the strike. . . . [E]mployers [do not] have carte blanche to refuse to permit prounion employees to return to work during a strike. . . ." *Id.* Diamond, however, did not refuse to permit Munoz and Miller to return to work, did not seek to use *carte blanche* authority and did not merely presume that Miller and Munoz *qua* Union backers would seek to further Union objectives.

Assuming without concluding that there is a decisive difference between the paid agent in *Sunland* and Miller and Munoz, we note that *Sunland* upheld the employer's *failure to hire.* But Diamond did not fail to reinstate; instead it merely assigned the returning strikers to nonsensitive positions during their temporary stint inside the plant.

evidence is required to create the risk that replacement workers could retaliate against or otherwise vent their anger on the most available Union activists. Especially in light of Brown's and Bubeck's testimony, as well as Bubeck's letter, there is no substantial evidence to support the Board's finding that replacements did not harbor hostility toward the returning strikers.

Second, the Board points out that the strike-related violence, threats and vandalism occurred in the early stage of the strike and had long since ceased by the time the activists returned to work in September 1993. Even were we to agree with the Board that strike-related threats and vandalism had ceased long before September 1993, that circumstance in no way took away from Diamond's concern, supported by the record, that replacement workers continued to harbor resentment. The hiatus of calm may have decreased the likelihood that *strikers* would engage in violence but the record does not support the Board's conclusion that the replacement workers had short memories. In September 1993 the strike was still on and a second representation election was around the corner.

Finally, the Board emphasized that Diamond did not supervise Munoz as she campaigned during breaks and did not establish that it supervised the other returning strikers during their breaks. "Therefore," the Board concluded, "the potential for violence against the strikers by the replacements existed even in the jobs to which they were assigned." *Diamond Walnut*, 316 N.L.R.B. at 38-39 n. 11. Granted, Diamond did not attempt to reduce the risk of violence to a zero probability. But does the Board really suggest that it would have found Diamond's actions lawful if Diamond had imposed *stricter* conditions on the returning strikers? Had Diamond done so, it might well have

risked an unfair labor practice charge for attempting to influence the outcome of the election. The Board's all-or-nothing approach is of cold comfort to an employer attempting to balance its business interests and the statutory rights of its employees.

The Board also discounted the risk of product tampering, sabotage or disruption, concluding that any earlier disparagement of Diamond or its product constituted protected activity under the Act. *Id.* at 39. Perhaps, and perhaps the disparagement would not have warranted a *refusal* to reinstate either Munoz or Miller. The issue before the Board, and us, however, is this: in light of their previous efforts to weaken Diamond economically and their continued obeisance to the Union's similar objective, was there a reasonable risk that once inside the plant they might again do something to damage Diamond? If so, could Diamond weigh that risk, together with a risk of violence or other disruption, in determining temporary job assignments within days of the election? We conclude that the clear answer is "yes."

C.

Because we conclude that Diamond proffered substantial and legitimate business justifications for its assignments of Miller and Munoz, the Board must establish affirmatively with independent evidence (*i.e.*, other than the discriminatory conduct) that Diamond's job-placement decisions were primarily motivated by an anti-union animus. *See generally NLRB v. Brown*, 380 U.S. 278, 286-90, 85 S.Ct. 980, 985-88, 13 L.Ed.2d 839 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312-13, 85 S.Ct. 955, 964, 13 L.Ed.2d 855 (1965). We see no reason to remand on this issue for, in our view, the record does not allow a finding that Diamond primarily intended "to

discourage union membership or otherwise discriminate against union members as such." *Id.* at 312, 85 S.Ct. at 964. Diamond's decisions were made to protect its business interests; indeed, "the record contains positive evidence of the employer['s] good faith." *Brown*, 380 U.S. at 290, 85 S.Ct. at 987. Diamond quickly reinstated the Union activists, who had no statutory right to reinstatement at the time,[10] gave them the opportunity to campaign for the Union in the work place and among replacements and allowed them to monitor activities inside the plant. Diamond even allowed Union officials to tour the plant and post literature as often as twice a day (up to two hours per tour), JA 233-34, while under no legal obligation to do so. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992).

IV. Discriminatory Placement of Kussair

Regarding Kussair, who, it appears, did not participate in the boycott campaign or the efforts to disparage Diamond's product, the Board found that Diamond discriminated against him by placing him in the growers' inspection department instead of offering him a seasonal loader job. We cannot agree, however, that substantial evidence supports the Board's finding that in Kussair's case the General Counsel established "discrimination

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10. We do not suggest that on the facts of this case Diamond could have lawfully refused to consider Miller and Munoz for vacancies for which they were qualified simply because neither their former jobs nor substantially equivalent ones were available. As noted, although an economic striker's right to reinstatement extends only to an equivalent or substantially equivalent job, the striker is nonetheless entitled to nondiscriminatory treatment when he applies for any job for which he is qualified. *Rose Printing* and *Laidlaw, supra*; *cf. Diamond Walnut*, 316 N.L.R.B. at 38.

and a resulting discouragement of union membership" necessary to trigger a section 8(a)(3) violation. *Great Dane*, 388 U.S. at 32, 87 S.Ct. at 1796; *American Ship Bldg.*, 380 U.S. at 311, 85 S.Ct. at 963-64; *Brown*, 380 U.S. at 286, 85 S.Ct. at 985. Although Diamond was not aware that Kussair wanted a loader job, it took into account his status as a striker in making his job assignment and therefore discriminated within the meaning of the Act. But in light of the facts that Kussair did not initially ask for a loader job and was offered the job when he asked for it, the discrimination was trivial and could not have had even a "comparatively slight" "tendency to discourage union membership," *Brown*, 380 U.S. at 287, 85 S.Ct. at 986. *See Boilermakers Local 88*, 858 F.2d at 761-62 ("It is clear that the Supreme Court intended the phrases 'inherently destructive' and 'comparatively slight' to encompass the universe of employer actions that have any *non-trivial*, adverse effect on employee rights.") (emphasis added).

Diamond decided not to assign any crossover employee to a loader position, fearing that it might give rise to an unfair labor practice charge: the position is a particularly arduous one (requiring, for example, the stacking and unstacking of 30-pound boxes and 55-pound bags throughout the work day) and one its employees often complained about. JA 114, 28. The ALJ found that the loader position "by any objective scale is more onerous and less desirable" than the position to which Kussair was assigned, JA 28, and the Board added that the job is "shunned by most employees," *Diamond Walnut*, 316 N.L.R.B. at 39. Nevertheless the Board concluded that Diamond should have offered Kussair that position because it paid more than the one he was assigned. Kussair did not initially ask for a loader job on returning to work in September 1993. Within one week of returning, however, he did ask his supervisor, Lexie Whiteman,

for a loader job within his department; when Whiteman told him that there were no vacant loader jobs in the department and asked if he wanted to transfer to a different department with a loader vacancy, Kussair declined. JA 24, 169. About a week later Kussair asked Wendy Heinze if he could transfer to a loader job. Heinze told Kussair that the company would accommodate him but Kussair quit before the transfer could take place. *Diamond Walnut*, 316 N.L.R.B. at 37. On these facts we conclude that the Board's finding that Diamond's treatment of Kussair constituted discrimination that discouraged Union membership is not supported by substantial evidence.[11]

* * *

For the foregoing reasons we grant Diamond's petition for review and deny the Board's cross-petition for enforcement of its order.

So ordered.

WALD, Circuit Judge, dissenting in part and concurring in part:

It is undisputed that except for their strike-related activities, returning strikers Munoz and Miller would automatically have

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11. The Board found that Diamond also discriminated against Kussair by reprimanding him: after receiving three warnings for not meeting job performance requirements, Kussair inappropriately addressed his supervisor and was reprimanded. In effect the Board concluded that Kussair would not have been reprimanded but for his unlawful assignment to the growers' inspection department. Because we reverse the Board's finding of discriminatory placement, we also reverse its discriminatory reprimand finding.

been considered for the positions of forklift operator and quality control assistant. The record, moreover, amply supports the NLRB's decision that Diamond Walnut ("Diamond") denied these two employees the opportunity to work in preferred jobs without legitimate and substantial business justification. Thus, I would affirm the Board's finding of a National Labor Relations Act ("NLRA" or "Act") violation with respect to these two strikers. In regard to Kussair, however, I agree that there is no evidence to suggest that Diamond would have placed him in a loader position, even absent his strike participation and therefore concur with the panel's decision to reverse the Board's decision with respect to him.

I. The Legal Standard

The majority in my view is diverted from the straightforward legal standard governing this case by its near-obsession with the fact that Munoz and Miller did not have a statutory right to reinstatement, *per se*. The fact is that once they expressed their interest in returning to work, they *did* have a right to nondiscriminatory treatment with respect to any jobs for which they were qualified. As the majority concedes in one easy-to-miss sentence of text and one footnote, Majority opinion ("Maj. op."), at 489, 493 n. 10, strikers who have unconditionally offered to return to work must be treated "the same as they would have been [treated] had they not withheld their services." *Rose Printing Co. & Graphics Comm. Workers Union*, 304 N.L.R.B. 1076, 1078, 1991 WL 197152 (1991). Under *Rose*, workers are "entitled to return to [their prestrike] jobs or substantial equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs.*" *Id.* (emphasis added). If an employer does *not* treat returning strikers the same as they would have been treated in

the absence of the strike, the employer must prove that it acted based on legitimate and substantial business justifications. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545-46, 19 L.Ed.2d 614 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1797-98, 18 L.Ed.2d 1027 (1967). Only if the employer successfully meets its burden of proving a *Fleetwood* "business justification" defense (which the Board reasonably concluded Diamond had failed to do in this case) does it become relevant whether the employer's actions were "inherently destructive" of employee rights, in which case the employer has violated the Act regardless of whether or not it acted based on antiunion motivation, *Great Dane*, 388 U.S. at 34, 87 S.Ct. at 1797-98, or if its actions were only "comparatively slight," in which case a violation will be found only if the employer acted out of antiunion motivation. *Id.*

Diamond admits outright to treating Munoz and Miller differently than it would have if the employees had not participated in the strike. Thus, the critical question in this case is whether Diamond proved that it acted based on legitimate and substantial business justifications. If, and only if, the Board erred on this point, does it become relevant whether the employer's actions were "comparatively slight" or "inherently destructive."

At numerous points in the opinion, the majority underscores the absence of any absolute right to *reinstatement*, and goes on to infer from that absence that Diamond has somehow bestowed a favor on Munoz and Miller by allowing them to return to work at all. For example, the majority writes:

> We first emphasize what this case does *not* present. This is not a failure-to-reinstate case. . . . Rather, the

> case involves *an employer's accommodation* of striking union activists, who, at the union's direction and with the union lawyer's guidance, sought to return to work temporarily. . . .

Maj. op., at 490 (emphasis added), 493 ("Diamond quickly reinstated the Union activists, who had no statutory right to reinstatement at the time."[1]) This approach is basically misguided. This case is about employees attempting to exercise a right they maintain when reinstatement to their prior jobs is unavailable — the right to nondiscriminatory consideration for other positions for which they are qualified. In this case, Diamond has admitted that it discriminated against certain returning strikers (those who maintained their affiliation with the Union) in considering their applications for new positions. The majority errs fundamentally when it gratuitously awards Diamond bonus points for giving these workers jobs at all. In fact, Diamond was legally bound to treat them like any other employees — no better, no worse.

The majority also makes much of the fact that the returning strikers in this case were motivated by their interest in lobbying for the Union's cause at the jobsite, rather than with promoting the general welfare of the employer. Maj. op. at 487-488, 490. Even if true, the employees' motivations for returning to work in no way license the employer to discriminate against them on the basis of their strike participation, as long as they submit

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1. Of course, Diamond did *not* actually *reinstate* the workers, since it did not place them in the same or substantially comparable jobs as those they performed before the strike. But this case is not *about* reinstatement. This case is about Diamond's admitted discrimination against returning strikers in considering their applications for new positions.

unconditional offers to return to work. *See, e.g., NLRB v. Town & Country Electric, Inc.*, __ U.S. __, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) (Union "salts" — organizers who apply for jobs with the intent to organize at the jobsite — are "employees" under the Act). In this case, Diamond admits that it adopted a "special" scheme for placing those returning workers who had announced their intent to advocate for the Union inside the plant. Diamond concededly refused to place the returning organizers in any position it thought might offer them the opportunity to sabotage the company's product or property, or which might expose the strikers to potential violence at the hands of replacement workers. By refusing to consider the workers for the full range of positions for which they were qualified, Diamond plainly "discriminated" against them within the meaning of *Rose Printing Co.* The next question, then, which the Board reasonably answered in the negative, is whether Diamond successfully proved a *Fleetwood* defense by showing that its discriminatory actions were based on a legitimate and substantial business justification?

II. Legitimate and Substantial Business Justifications

Based on *Rose*, the Board expressly determined in this case that Diamond did *not* prove an adequate business justification, and therefore violated § 8(a) when it refused to consider the returning strikers for certain higher-paid jobs for which they were qualified and for which the employer would have considered them, *but for* their Union activity. *Diamond Walnut*, 316 N.L.R.B. at 39. If substantial evidence in the record supports this conclusion, we cannot "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S.

474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). The majority, however, finds that Diamond's *articulated* concerns by themselves do indeed constitute legitimate and substantial business justifications, and therefore excuse the employer's conceded discrimination. In doing so, I believe the majority misinterprets existing law and ignores the impact of analogous contrary decisions involving differential treatment based on disloyalty or misconduct concerns.

A. *The Fear of Violence*

The majority unqualifiedly accepts Diamond's asserted fear of violence by replacement workers against the returning strikers as a justification for deviating from regular placement procedures — even accepting the fact that the actual violence had long-since ceased. Maj. op. at 493. The Administrative Law Judge ("ALJ") found: (1) that most of the violence associated with the strike had occurred in the early months of the dispute, *Diamond Walnut,* 316 N.L.R.B. at 46 n. 12; and (2) that there was no evidence to suggest that the returning workers had made any threats against replacement workers or that the Union had threatened to sabotage equipment or products, *id.* at 46. In light of these findings, the ALJ reasonably concluded — and the Board reasonably affirmed — that the employer had not sufficiently justified its special treatment of the workers based on their Union involvement.

Reversing the Board, the court today explains that the "replacement workers continued to harbor resentment" toward the strikers. Maj. op. at 493. But animosity between replacement workers and returning strikers is certainly not unusual in the workplace; if comments like those cited by the majority (for example, "[G]ee, what happened if they fell down in the rest

room or in the locker room," Maj. op. at 491) are enough to justify an employer's discriminatory treatment, the NLRA's guarantee against strike-related retaliation will indeed ring hollow.

B. *The Fear of Sabotage*

The majority's second justification for Diamond's actions — the company's stated fear of sabotage — is equally gossamer. In *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1331 (D.C.Cir.1992), we identified, but left for another day, the question of when an employee's ties to a union establish such a risk of disloyalty as to justify the (nonunion) employer's rejection or dismissal of the worker on that ground. The majority reaches out for that question today, deciding, in this case at least, that an employer can discriminate against a worker based on mere fears of sabotage conspiracies for which there is no evidentiary support whatsoever apart from the worker's endorsement of an ongoing strike.

The dispositive fact on this issue, in my view, is the employer's complete failure to produce a shred of evidence of intent to sabotage on the part of Munoz, Miller, or Kussair. The majority glosses over this critical fact by citing, as support for Diamond's fears of sabotage, the text of a vitriolic letter for which the Union had disavowed any responsibility and which not a smidgen of evidence suggests was penned by one of the returning workers (and to which, for that reason, the ALJ reasonably assigned no weight in this matter). Maj. op. at 491 n. 8.

So, not only is the record in this case utterly devoid of any evidence identifying these individuals as a physical threat to

the company, but to the contrary, the record reveals that they received good pre-strike reviews; that they had never been accused of writing or distributing the single letter Diamond challenges as unprotected activity; and that they are not alleged to have threatened the employer or to have themselves been threatened by replacement workers. To support its theory of disloyalty, the majority can point only to Miller's and Munoz's admitted participation in a cross-country bus tour to disseminate negative information about the employer's labor policies and to encourage a boycott of Diamond walnuts — both protected activities, as the ALJ specifically found. *Diamond Walnut,* 316 N.L.R.B. at 47 ("I conclude that the statements made by strikers or the Union representing them in the instant case are linked to the labor dispute in question. Furthermore, the fact that they may be biased or contain hyperbole does not render them unprotected.").

A review of prior cases addressing employee disloyalty reveals that the majority has gone far beyond existing legal benchmarks for employers' discriminatory treatment of workers suspected of insurrection. Their opinion contains a strong implication that a returning worker must somehow disavow her support for an ongoing strike in order to be considered for employment on equal footing with other employees. *See* Maj. op. at 490 (distinguishing this case from one in which an employee either "[seeks reinstatement] after the strike is over or withdraws his support of the strike and crosses the picket line in order to earn a living"). That is not the law. There is Supreme Court precedent that an employer can justify the decision to dismiss a union employee on disloyalty grounds only where the employee is personally responsible for disloyal activity. In *NLRB v. Local Union No. 1229,* 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953) (*Jefferson Standard*), the Court

wrote: "In such cases, it often has been necessary to identify *individual employees* . . . and to recognize that their discharges were for causes which were *separable* from the concerted activities of others whose acts might come within the protection of § 7." *Id.* at 474, 74 S.Ct. at 177-78 (emphasis added). Even though Diamond argues that it could reasonably assume that the Union was responsible for the one tasteless letter to customers (since the letter claims to be from the "original and united worker's [sic]," Joint Appendix ("J.A.") 376), it does not even *allege* personal involvement on the part of these three employees.[2]

The Supreme Court very recently issued another decision rejecting an employer's attempt to infer disloyalty merely from its employee's union activity. In *NLRB v. Town & Country Electric, Inc.*, __ U.S. __, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) ("*T & C*"), the employer argued that the NLRA did not offer full protection to applicants who intended to conduct on-site organizing for a union. The employer there, like Diamond here, worried that these organizers "might try to harm the company . . . perhaps disparaging the company to others, perhaps even sabotaging the firm or its products." *Id.* at __, 116 S.Ct. at 456.

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2. Furthermore, even if Diamond believed in good faith that the specific employees wrote the offending letter, it would not be justified in discriminating against the strikers if in fact the employer was mistaken. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23, 85 S.Ct. 171, 172-73, 13 L.Ed.2d 1 (1964). In *Burnup*, the Court explained that such a good faith exception could discourage legitimate union activity: "Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *Id.* at 23, 85 S.Ct. at 173. *Cf. Coca-Cola Bottling Co.*, 186 N.L.R.B. 1050 (1970).

Appendix E

In rejecting the employer's contention that applicants who are also union organizers are not to be allowed the same protection as other "employees" within the meaning of the Act, Justice Breyer, writing for a unanimous Court, pointed out several "serious problems" with the employer's argument. Each of these "problems" is present in Diamond's case to at least as great a degree as in *Town & Country*. First, the Court noted that "nothing in this record suggests that such acts of disloyalty were present, in kind or degree, to the point where the company might lose control over the worker's normal workplace tasks." *Id.* In the Diamond case, not only is there no evidence of any acts of disloyalty on the part of the returning workers, but the employer's Director of Human Resources expressly admitted that whether or not the individual workers had personally engaged in strike misconduct played no part in the determination of job placements. Testimony of Vince Brown, J.A. 214-15.[3] Of course, if these workers did not engage in any misconduct, then Diamond's treatment of them amounts to a penalty merely for engaging in protected activity. But an employer cannot lawfully punish its workers in this way; "After all, the employer has no

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3. Vince Brown, Diamond's Director of Human Resources, gave the following testimony:

> Q: So, I take it, that wasn't a factor in your determination as to what positions these individuals should be placed in; is that fair to say?
>
> A: Whether or not they were involved in strike misconduct?
>
> Q: Yes.
>
> A: I don't think that was a factor, no.

legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity." *T & C*, __ U.S. at __, 116 S.Ct. at 456.

Second, the Court found that "the argument proves too much," because the dangers of disparagement and sabotage are not limited to union organizers. *Id.* "[I]f an overly zealous union organizer might hurt the company through unlawful acts, so might an unpaid zealot (who may know less about the law), or a dissatisfied worker (who may lack an outlet for his grievances)." *Id.* Likewise, in the case before us, there is no reason to believe that these returning strikers are more likely to sabotage the company than other returning strikers who had disassociated themselves with the strike and who admittedly received different treatment. In fact, logic would suggest that a striker returning with the express intent of wooing replacement workers to support the Union would go out of her way to minimize the possibility of reflecting poorly on the Union. It is beyond my ken why a worker who has never been accused of engaging in acts of disloyalty or sabotage would suddenly choose to drive a forklift into a company building at the very time she is trying to make a good impression on the replacement workers.[4]

Finally, the unanimous *Town & Country* court noted that the law offered the employer alternative remedies to respond to its concerns. For example, "[a] company faced with unlawful (or possibly unlawful) activity can discipline or dismiss the worker, file a complaint with the Board, or notify law enforcement authorities." *Id.* at __, 116 S.Ct. at 457. This observation seems particularly relevant in Diamond's situation,

4. I also see no reason to assume that the replacement workers are more likely to act out against Munoz, Miller, or Kussair than against the Union activists picketing in front of the company gates.

where one of the company's "legitimate and substantial justifications" is its concern that *replacement workers* will attack the *returning strikers.* Diamond could minimize this concern in any number of ways without punishing the potential "victim" of the violence: the employer could institute stringent guidelines prohibiting violent behavior, could dismiss rowdy replacement workers, or could call the police if it suspected actual foul play. To the extent that the majority holds that fear of retaliatory violence alone constitutes a *Fleetwood* defense, it portends employer discrimination against returning workers at the *end* of a strike as well as during it. Thus, the court today adjusts an employee's rights under the NLRA depending on his or her popularity among nonstrikers. Such a view is clearly contrary to the Act's purposes of "protecting the right of employees to organize for mutual aid without employer interference, and encouraging and protecting the collective-bargaining process." *Id.* at __, 116 S.Ct. at 454 (citations omitted).

Of course, striking employees who engage in serious misconduct while on strike lose the protections of the Act and are not entitled to reinstatement. *See Medite v. NLRB,* 72 F.3d 780, 790 (10th Cir.1995). However, "an employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct." *Id.* (citing *Midwest Solvents, Inc. v. NLRB,* 696 F.2d 763, 765 (10th Cir.1982)); *see also NLRB v. Augusta Bakery Corp.,* 957 F.2d 1467, 1477 (7th Cir.1992) ("To lawfully deny an employee reinstatement at the conclusion of the strike on this ground, an employer must produce evidence connecting the discharged employees to specific strike misconduct."). No such evidence exists with respect to Munoz, Miller, and Kussair, and the majority has neglected to explain why a justification that would clearly fail to excuse a refusal to reinstate workers, Maj. op. at

493 n. 10, does not also fail to justify a refusal to treat workers nondiscriminatorily.

1. *Alfonsina Munoz*

Munoz worked as a year-round lift truck operator before the strike, and the parties agree that Diamond had a vacant position as a seasonal lift truck operator available at the time she crossed the picket line. Diamond admits that Union-related considerations — specifically, the fear of her union sympathies inciting violence or leading her to engage in sabotage — prevented the employer from placing her in the seasonal forklift position and resulted in her assignment instead as a "cracker" in the growers' inspection department. As a cracker, it was her job to crack open 17,000 grams of walnuts per day at a pay rate of $5/hour. The parties stipulated that she was qualified to work as a lift truck operator, and that she would have made from $7.50 to $10 per hour at that job. Nevertheless, Diamond refused to consider her for the more lucrative position, for fear that her presence in that job would incite others to violence or would allow her to cause damage with her lift truck.

For the reasons already articulated, I do not believe Diamond's unsubstantiated fear of violence constitutes a legitimate and substantial business consideration. Similarly, I believe that the Board correctly rejected Diamond's sabotage fears as a *Fleetwood* defense. Without evidence, the notion that Munoz would act out a sabotage plan simply because of her Union sympathies is not adequate to allow discriminatory treatment.

"As for Munoz," the majority notes, "although she was qualified to fill a vacancy as a lift truck driver, Diamond

legitimately decided not to put her behind the wheel of the 11,000-pound vehicle. Not only did the lift truck driver move about the plant unsupervised, the truck itself, with an inattentive operator, could cause damage inside the plant." Maj. op. at 492. Notably, neither the majority nor Diamond points to any evidence that Munoz had ever made a threat against the company, or had ever engaged in sabotage activities. The only evidence Diamond cites is Munoz's undenied involvement in the strike and boycott campaign, which included distribution of leaflets critical of the employer. *See* J.A. 272, 309, 313. Clearly, a striking employee's expression of disagreement with the employer's labor policies is not enough to justify the employer's decision to discriminate against that worker when she returns to the job. In fact, preventing an employer from engaging in just this sort of retaliation is what the NLRA is all about. Thus, without something more, I cannot buy into the majority's assumption that a striker who handed out union-sponsored handbills, but who now wants inside the plant in order to campaign for an election, presents a danger of going on a rampage with an 11,000-pound vehicle.

2. *Willa Miller*

Miller worked as a year-round quality control supervisor before the strike, but was appointed to a position as a packer when she returned to Diamond. As a packer, Miller spent her days stuffing one-pound bags of walnuts into large boxes. The parties stipulated that there were positions available as quality control assistants, that she was qualified for them, and that she would have made thirty-two cents more per hour in one of those placements. Diamond explains Miller's assignment as a packer primarily in terms of the company's sabotage considerations, and secondarily based on the fear of violence against her. *See* Brief for Petitioners at 31-33.

As for the sabotage concerns, the employer is on only slightly firmer ground with respect to Miller than with respect to Munoz. In an analysis that applies to Munoz as well as Miller, the court notes that both women fully supported the Union's boycott campaign, and from this concludes that, "Diamond knew of Munoz's and Miller's track record of attempting to damage Diamond economically." Maj. op. at 492. Because of her desire to harm the employer economically, the majority apparently infers that Miller might abuse a quality control position to "sabotage" Diamond's product, by turning a blind eye when rotten nuts passed her way. Although this sort of "passive" sabotage is somewhat more fathomable than the "active" version required for Munoz's hypothetical forklift frenzy, Diamond has still failed to introduce any evidence suggesting that Miller in particular might have any tendency to engage in this conduct. What Diamond actually *knew* about these workers was not that they intended to harm Diamond, but simply that they supported the strike and had engaged in protected strike activity.

Thus the Board reasonably determined that an employer's mere speculation that Union sympathies might lead a previously commendable worker to commit sabotage does not meet the *Fleetwood* standard. And "unless the NLRB has clearly . . . misperceived the facts, we will not second-guess its judgment." *Randall v. NLRB*, 687 F.2d 1240, 1245 (8th Cir.1982).

3. *Mohammed Kussair*

Mohammed Kussair worked as an air separator operator before the strike. The parties stipulated that there were no permanent or seasonal jobs available in this position when Kussair returned to work. Diamond placed him instead as a cracker in the growers' department, where he had never worked

before. The parties also stipulated that there were loader positions available at the time Kussair returned to work, and that he would have made $1 more per hour at that job. Kussair's supervisor, whose testimony the ALJ specifically credited, testified that Kussair at some point asked to be transferred to a loader job and was offered a position, which he declined, as a loader in another department. On October 6, when Kussair again asked to transfer to a loader position, his supervisor told him that he could do so on the 8th of the month. Before he could take advantage of the transfer, however, he resigned from Diamond and rejoined the strike.

The ALJ also specifically credited the employer's witness, who testified that Diamond had not placed returning workers in the loader positions because those jobs, which many workers considered particularly onerous, required the employee to lift heavy boxes and bags all day. Even though the employer cannot lawfully consider Kussair's Union activity as a justification for denying him a position, the particular facts in Kussair's case do not justify the Board's determination that Diamond discriminated against Kussair. Kussair did not initially ask to be a loader; he was not a loader at the time he went on strike; he was told he could transfer into a loader spot and he refused; and the employer could not have known that he would have preferred a strenuous job over a tedious one. Since there was no discriminatory treatment to begin with, the fact that the ALJ rejected the employer's *Fleetwood* defense is irrelevant; there has been no NLRA violation.

In the growers' department, Kussair had trouble meeting his 17,000 grams/day quota, and received oral reprimands three times during his first two weeks. After the third reprimand, he hollered at his supervisor and was given a written reprimand.

The Board ordered that the written reprimand be removed from his files, because it "was the product of the unlawful job assignment." J.A. 18. Since the evidence does not support the conclusion that the assignment was unlawful, the order regarding the reprimand must be reversed as well.

III. Conclusion

Contrary to established legal precedent, the majority today approves penalties leveled at returning workers based on mere speculation that the workers — whom the employer admits had good records with the company and about whom the employer had no individualized concerns — will sabotage the company's product or themselves become the victims of co-worker violence. Unlike the majority, I believe that the Board correctly applied the law to the facts when it decided that Diamond had violated the NLRA. The record amply supports the Board's conclusion that these workers did not pose a serious threat to the purity of Diamond brand walnuts or to the safety of either themselves or their fellow employees. We should therefore deny Diamond's petition for review of the Board's order.

APPENDIX F — DECISION, ORDER AND DIRECTION OF THIRD ELECTION OF THE NATIONAL LABOR RELATIONS BOARD DATED JANUARY 20, 1995

Diamond Walnut Growers, Inc. ***and*** **Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters, AFL-CIO.** Cases 32-CA-13479 and 32-RC-3553

January 20, 1995

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

By Chairman Gould and Members Browning and Truesdale

On June 21, 1994, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed limited exceptions and a supporting brief.[1] The Respondent and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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1. The Charging Party Union filed a motion to strike certain portions of the Respondent's brief in support of its limited exceptions which, according to the Charging Party, are beyond the scope of its limited exceptions. In light of our holdings here, we deny the Charging Party's motion.

Appendix F

This case involves a second representation election,[2] which was held during an economic strike, and allegations that the Respondent engaged in objectionable conduct and committed various acts in violation of Section 8(a)(3) and (1) of the Act in the weeks leading up to the election which the Union lost. The judge dismissed the 8(a)(3) and (1) complaint allegations and overruled all election objections which were consolidated for hearing with the complaint.[3] We reverse the judge and find that

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2. The first election in this case was set aside by the Regional Director by order dated September 17, 1993. The procedural history of the first election is set forth in fn. 3 of the judge's decision.

The second election at issue here resulted in an initial tally showing 310 for and 195 against the Union, with 635 determinative challenged ballots. Thereafter, in proceedings which involved two separate decisions by the Regional Director resolving the challenged ballots and the denial by the Board of requests for review filed by the Union and the Respondent to the Regional Director's first decision on challenges, a final revised tally was issued showing 475 for and 575 against the Union.

As to the objections filed by the Union to the second election, the Regional Director ordered Objections 2, 4, 8, and 11 consolidated with the complaint allegations for hearing before the judge, and overruled all remaining objections, including Objections 5 and 17. The Board, thereafter, granted the Union's request for review of the Regional Director's overruling of Objections 5 and 17. We discuss these two objections, infra, at fn. 15.

The Union has requested oral argument with respect to the issues raised by Objection 17. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

3. No exceptions were filed to the judge's overruling of the Union's Objections 2, 4, and 8 and these findings are adopted pro forma. Similarly, no exceptions were filed to the judge's failure to find that the Respondent violated the Act by delaying the reinstatement of strikers Shaw and Rosas or by condoning a physical attack by an employee on Union Organizer Macchello, and we adopt those findings pro forma.

the Respondent violated the Act by its discriminatory treatment of three economic strikers in reinstating them to work just prior to the election. We further find that these violations, which encompassed the Union's Objection 11, warrant application of our usual policy, set out in *Dal-Tex Optical Co.*,[4] of directing a new election when, as here, the unfair labor practices were committed during the critical period.

The Respondent operates a seasonal business receiving, processing, and marketing walnuts at its facilities in Stockton, California, where the Union has represented the employees for a number of years. The work force consists of regular year-round employees, supplemented by seasonal hires during the Respondent's peak season in September and October.

On September 4, 1991, 2 months after the expiration of the parties' most recent collective-bargaining agreement, the Union commenced an economic strike which, at the time of the events at issue here, was still in progress. The Respondent continued operations by hiring both year-round and seasonal permanent replacement employees.

On September 17, 1993,[5] the Regional Director directed the instant second election be held on October 7 and 8. By letter dated September 20, the Union informed the Respondent that "[s]everal of the strikers share the Union's conviction . . . that a fair election is simply impossible at this point. Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers . . . have an

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4. 137 NLRB 1782 (1962).

5. All dates hereinafter are in 1993 unless otherwise stated.

opportunity to hear from Union sympathizers." Accordingly, the Union requested in its letter that four named economic strikers, including Willa Miller, be returned to work unconditionally. The next day the Union notified the Respondent that strikers Alfonsina Munoz and Mohammed Kussair also desired to return to work unconditionally.

The Respondent replied that all year-round employee positions were currently filled by permanent replacements and that seasonal positions were the only jobs available. Miller, Munoz, and Kussair, each of whom held year-round jobs before the strike, agreed to accept the seasonal jobs.

Miller was assigned as a casepacker in the Respondent's "cello" department, where she packed bags of walnuts into cartons for later shipment. Prior to the strike, Miller worked in the quality control department overseeing the work of "quality control assistants." At the time she applied for reinstatement, there were several quality control assistant openings which paid a higher hourly wage than the casepacker position to which she was assigned.

Munoz and Kussair were both assigned jobs as "crackers" in the growers inspection department where they cracked open walnuts for the purpose of determining the quality and price to be paid growers for their crop. Prior to the strike, Munoz was a lift truck operator and Kussair operated an air separator machine which vacuumed walnut shells and other debris off the walnut meats. Although both of these year-round positions were held by permanent replacements, seasonal positions as lift truckdriver and loader were available and paid more than the jobs which Munoz and Kussair were given.

Appendix F

In the first 2 weeks of his employment as a cracker, Kussair received from his supervisor, Lexie Whiteman, three separate oral warnings for not meeting a daily production quota of 17,000 grams of cracked walnuts. Whiteman testified that after she gave Kussair the third warning he became "very angry. He got into . . . in my face and was hollering." Whiteman reported the incident to Vince Brown, the director of human resources, who issued Kussair a written reprimand on October 1 for insubordination and inadequate production. Thereafter, Kussair requested a transfer to a loader position and the Respondent agreed; but, on October 7, the day before the transfer was to take place, Kussair left his job and went back on strike.

The second election was held as scheduled on October 7 and 8 at the Respondent's facility and at a neutral off-site location for striking voters. After casting their ballots, Miller and Munoz left their jobs and, like Kussair, rejoined the strike.

The judge's decision

The judge found that the controlling rule of law with respect to the issue in this case was stated by the Board in *Rose Printing Co.*:[6]

> [A]n employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform.

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6. 304 NLRB 1076 (1991).

Applying these principles, the judge found that Miller, Munoz, and Kussair were qualified for the positions of quality control assistant, lift truckdriver, and loader, respectively, but because those positions were all seasonal jobs lasting only 8 to 10 weeks, the judge found that the positions were not substantially equivalent to the strikers' former jobs which were regular year-round positions. Accordingly, the judge concluded that under the above-stated principle of *Rose Printing* the General Counsel had failed to establish a prima facie case that the three strikers were discriminatorily denied those positions because he found that the seasonal jobs available were not substantially equivalent to their prestrike jobs and thus they were not entitled to the seasonal jobs. On this basis, the judge recommended that the complaint be dismissed.

The judge, however, made a further finding that if the Board rejected his finding and concluded that the General Counsel has established a prima facie case of discrimination against the returning strikers, then he would find that the Respondent violated Section 8(a)(3) and (1) of the Act because the Respondent failed to establish legitimate and substantial business justifications for placing the returning strikers in the jobs to which they were assigned. He based this alternative finding on the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co.*,[7] which held that an employer's refusal to reinstate economic strikers after a strike violates Section 8(a)(3) and (1) unless it can be shown that the refusal was for "legitimate and substantial business justifications."[8]

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7. 389 U.S. 375 (1967).

8. We note that the judge's description of the Supreme Court's holding in *Fleetwood is* not entirely correct, but, in light of our holding below, we find no need to correct his error.

Appendix F

Discussion

We find that the judge erroneously based his dismissal of the complaint on a theory which was neither alleged nor argued by the General Counsel. The General Counsel conceded in the complaint, as well as before the judge, that the seasonal jobs were not substantially equivalent to the strikers' prestrike jobs and thus the General Counsel never contended that the Respondent had an obligation under *Rose Printing* to reinstate the strikers to the seasonal jobs.[9] Rather, the General Counsel relies on an alternative theory of unlawful discrimination, outlined in *Rose Printing* and overlooked by the judge, which states:

> Our duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs*. [Id. at 1078, emphasis added.]

As the Board specifically noted in *Rose Printing*, the General Counsel there did "not [litigate that] case on the theory that the [r]espondent refused to offer employees work in other jobs because of their status as former strikers." Id. Here, the General Counsel did litigate the case on that theory, and we find that a prima facie 8(a)(3) violation was established and was not rebutted by the Respondent.

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9. We express no opinion in this case on the Board's finding in *Rose Printing* that an employer has no obligation to reinstate strikers to available jobs that are not substantially equivalent to their prestrike positions.

Thus, although the Respondent was under no legal obligation under *Rose Printing* to reinstate the strikers to jobs that were not substantially equivalent to their prestrike jobs, once it voluntarily decided to reinstate them, it was required to act in a nondiscriminatory fashion toward the strikers. The General Counsel contends that the Respondent failed to act in a nondiscriminatory fashion toward Miller, Munoz, and Kussair because in reinstating them it refused to place them in the positions of quality control assistant, lift truck operator, and loader, respectively, because of their union status and/or because of certain protected union activity they engaged in while on strike.

The Respondent admits that it refused to reinstate the strikers to these positions but contends that such refusal did not violate the Act because "it [was] more than justified [in] *placing minor restrictions* on their job assignment to protect [its] product, the plant and the employees." Accordingly, the Respondent defends its conduct on the basis that it has satisfied the required burden under *Fleetwood* of showing "legitimate and substantial business justifications" for its actions.

In support of its *Fleetwood* defense, the Respondent emphasizes that from its inception and continuing through the events at issue here, the Union's strike has been marred by a number of violent acts allegedly directed by the Union at replacement employees.[10] In addition, the Respondent notes that during the strike the Union instituted an international boycott of its product, which included a bus tour around the country where leaflets were disseminated to the public which depicted

10. The Respondent cites as evidence many of the same incidents detailed by the judge in a prior case involving these two parties. See *Diamond Walnut Growers*, 312 NLRB 61, 64-66 (1993).

the Respondent's work force as composed of "scabs" who were packaging walnuts contaminated with "mold, dirt, oil, worms and debris." According to the Respondent, these acts of violence, as well as the attacks on product quality and the integrity of the replacement employees, engendered the buildup of a considerable degree of hostility among these employees. Therefore, against this backdrop, the Respondent states that when it received the Union's letter of September 20 offering, on the named-strikers' behalf, to return to work, it decided against placing Miller in the sensitive position of quality control assistant where the final visual inspection of walnuts is made prior to leaving the plant. Given that she was an active participant in the boycott and bus tour where its walnuts were asserted to be tainted, the Respondent states that it could not risk placing Miller in that position where she would be provided "with an easy opportunity to let defective nuts go by undetected or to place a foreign object into the final product, thereby legitimizing the Union's claims of tainted walnuts." As to Munoz, who like Miller also traveled with the bus tour, the Respondent states that assigning her a lift truckdriver job was out of the question because in that position she not only could be confronted by hostile replacement employees if caught in an isolated area of the plant, but she would also have the same opportunity as Miller to damage its product by driving the 11,000 pound lift trucks in a careless manner. Finally, with respect to Kussair, although he was not actively involved in the boycott or accompanying bus tour, the Respondent states that a "conscious decision had been made to not place any of the strikers in positions as loaders" because the loader position is the "single most complained-about position in the entire plant . . . [and that it] knew full well that the Union would object" if Kussair were placed in that more "onerous" position. In any event, the Respondent states that even assuming it committed a violation for not giving him a loader

job initially, it was later "remedied when the [Respondent] agreed to transfer Kussair" upon his request.

The judge rejected the Respondent's defense. Assuming, arguendo, that a *Fleetwood* defense is applicable to the instant case, we reject it for the same reasons that he did. Thus, with respect to the violence committed against the replacement employees, which the Respondent contends raised the specter of replacement employees retaliating in kind against the strikers, there is no evidence that Miller, Munoz, or Kussair were involved in that conduct and, as the judge noted in his prior decision, "in most of the incidents the perpetrator is unknown." 312 NLRB at 67. Furthermore, there is no specific evidence that any replacements harbored hostility toward these three strikers, and, if such evidence did exist as the Respondent claims, we fail to see how placing them in the positions to which they were assigned would lessen the perceived danger of retaliatory acts being committed against them.[11] Under these circumstances, we find that the Respondent was not justified in restricting the strikers' job placements out of fear that the replacement employees would retaliate against *these* three strikers. Nor do we find that the Respondent's conduct was justified by the participation of Miller and Munoz in the boycott and circulation of leaflets disparaging the Respondent's product and work force.

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11. The Respondent contends that the jobs to which it assigned the strikers were more highly supervised than those to which they were refused reinstatement and, therefore, afforded the strikers more protection against violent replacement employees. In rejecting this contention, we note that the Respondent admitted that Munoz "freely roamed" the plant unsupervised during her breaks and that there is no evidence to indicate that Miller and Kussair did not similarly spend their breaktime unsupervised. Therefore, the potential for violence against the strikers by the replacements existed even in the jobs to which they were assigned.

Appendix F

As the judge found, the strikers' conduct constituted protected Section 7 activity and there is no evidence indicating that such protection was lost because of threats made by Miller and Munoz to damage or sabotage the Respondent's equipment or products. Accordingly, we agree with the judge that the Respondent failed to establish legitimate business justifications for restricting the job placements of Miller and Munoz admittedly for union considerations.

We are similarly unpersuaded by the reasons given by the Respondent for Kussair's job placement. Although his circumstances differ from those of Miller and Munoz to the extent that he was not an active participant in the boycott or bus tour, he was a striker and the Respondent admits that it took that fact into consideration in deciding to assign him to the cracker position rather than to the loader job. However benevolent the Respondent claims its decision was, we find that it was nevertheless unlawfully discriminatory and was not justified by the fact that the loader job was comparatively onerous and shunned by most employees. Whether or not Kussair viewed the loader job this way was a decision for him to make, not the Respondent unilaterally. Because we find that Kussair's placement in the cracker position was unlawful, we further find, in agreement with the General Counsel and contrary to the judge's conclusion, that the reprimand he received while in that position was the product of the unlawful job assignment and, thus, was also a violation of Section 8(a)(3) and (1).

In sum, we find for the foregoing reasons that the Respondent's proffered *Fleetwood* defense lacks merit, and, thus, we find that by its failure to offer Miller, Munoz, and Kussair positions as quality control assistant, lift truck operator, and loader, respectively, the Respondent has violated Section 8(a)(3) and (1) of the Act.

Appendix F

Having concluded that the Respondent violated the Act in its discriminatory job assignments of the strikers, the question remains whether this conduct, which was committed during the critical period following the direction of election and which the Union included as a timely filed election objection, warrants setting aside the election. We find that it does. As noted above, our usual policy under *Dal-Tex Optical Co.* is to set aside an election whenever unfair labor practices are committed during the critical period, because such conduct "is, *a fortori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." 137 NLRB at 1786-1787. Although it is true, as the Respondent notes, that an exception is made to this policy when it is virtually impossible to conclude that the violations have affected the election results,[12] we do not find that exception applicable here. Unlike the two cases cited by the Respondent which both involved 8(a)(1) conduct affecting only a small number of employees relative to the size of the bargaining unit,[13] the conduct here involved serious violations of Section 8(a)(3) in which employees were denied jobs solely because of their protected strike activity, while at the same time being placed in positions that were among the lowest paying in the plant. Although the bargaining unit here is substantial, numbering almost 1300 employees, 8(a)(3) violations, as the Board stated in *Baton Rouge General Hospital*,[14] are "by their nature, not fleeting in their effects, and they are unlikely to escape the notice of fellow employees." 283 NLRB at 192 fn. 5.

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12. See, e.g., *Clark Equipment Co.*, 278 NLRB 498 (1986).

13. *Clark Equipment Co.* (8 employees affected in a unit of over 800); *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (2 employees affected out of a unit of 106).

14. 283 NLRB 192 (1987).

The Respondent's discriminatory treatment of these three employees was particularly likely to come to the attention of fellow employees in this case in view of the fact that the three discriminatees were sent back into the unit for the express purpose of communicating the Union's message to the unit employees. It was unlikely to escape notice by the unit employees that the Respondent did not look with favor on employees who chose to take such a leading role on behalf of the Union. We further note that the violations occurred close in time to the election.

On balance, therefore, in light of the seriousness of the violations and their timing, we find that the election should be set aside.[15]

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15. In light of the finding that the election should be set aside based on the 8(a)(3) violations found above, we find it unnecessary to pass the Union's Objection 5. Further, Members Browning and Truesdale find it unnecessary to pass on the Union's Objection 17 regarding the Regional Director's failure to conduct a mail ballot election. However, they note that it may well be within the Regional Director's discretion to conduct a mail ballot election, in whole or in part.

Chairman Gould would sustain the Union's Objection 17 and find that the Regional Director's failure to conduct a mail ballot election in this case also warrants setting aside the election. In this regard, he notes that prior to the second election the Union requested that it be conducted by mail ballot because many strikers had temporarily relocated to distant locations to find interim employment and would be unable to get to the polls to vote. He finds mystifying and meritless the Respondent's contention that this prediction by the Union about the need for a mail ballot has become moot by the fact that the Union lost the ensuing election by a margin of 100 votes and that the Union could point to only 35 strikers whom it could not contact prior to the election. The relevant fact here is not that the Union contacted all but 35 strikers, but rather that, according

(Cont'd)

Appendix F

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the position of quality control assistant, lift truckdriver, and loader, respectively, and to make them whole for the loss of earnings and benefits that they have suffered as a result of the discrimination against them.[16] Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to Kussair's unlawful reprimand and to notify him that this has been done and that this unlawful action will not be used against him in any way.

(Cont'd)

to the final election tally, approximately 135 eligible employees failed to vote. Under these circumstances, where the Union advised the Regional Director that strikers would be unable to reach the polls and where a significant number of eligible voters, in fact, did not vote, he finds that the Regional Director abused his discretion by denying the Union's request for a mail ballot election. *Shepard Convention Services*, 314 NLRB 689 (1994).

16. We leave to the compliance stage of this proceeding the Respondent's contentions that its backpay liability with respect to the three strikers is tolled as of the date they rejoined the strike, or, in the case of Miller, that her backpay is tolled on the day she reported in sick, and that Kussair's backpay is tolled on the day his request for a loader position was granted.

Appendix F

ORDER

The Respondent, Diamond Walnut Growers, Inc., Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the seasonal positions of quality control assistant, lift truckdriver, and loader, respectively, because of their union status or their union activities.

(b) Reprimanding employees for their failure to maintain job standards while performing in positions which they were unlawfully assigned.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Miller, Munoz, and Kussair immediate and full reinstatement to the seasonal positions listed above and make them whole for the loss of earnings and benefits they have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(b) Remove from its files any reference to Kussair's unlawful reprimand and notify him in writing that this has been done and that this reprimand will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of this Order.

(d) Post at its facility and place of business in Stockton, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

It is further ordered that the election held on October 7 and 8, 1993, in Case 32-RC-3553, is set aside and that this case is severed and remanded to the Regional Director for Region 32 for the purpose of conducting a new election.

[Direction of Third Election is omitted from publication.]

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17. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix F

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not refuse to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the positions of quality control assistant, lift truckdriver, and loader, respectively, because of their union status or their union activities.

We will not reprimand employees for their failure to maintain job standards while performing in positions which they were unlawfully assigned.

We will not in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

We will offer Miller, Munoz, and Kussair reinstatement to the seasonal positions listed above and we will make them whole, with interest, for the loss of earnings and benefits they have suffered as a result of the discrimination against them.

We will remove from our files any references to Kussair's unlawful reprimand and notify him in writing that this has been done and that this unlawful action will not be used in any way against him.

Diamond Walnut Growers, Inc.

Appendix F

JoEllen Marcotte, Esq., for the General Counsel.

Robert G. Hulteng and *Robert Leinwand, Esqs.*, of San Francisco, California, for the Respondent.

Kenneth C. Absalom, Esq., of San Francisco, California, for the Charging Party.

DECISION

Statement of the Case

Michael D. Stevenson, Administrative Law Judge. This case was tried before me at Stockton, California, on March 23, 24, 25, and 28, 1994,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 32 on January 26, 1994. In addition, on February 2, 1994, the Regional Director ordered consolidated certain issues arising from a representation election in Case 32-RC-3553. The complaint, based on a charge filed on October 4, by Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters (the Union), alleges that Diamond Walnut Growers, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.[2]

The Union's representation petition was filed on April 17,

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1. All dates refer to 1993 unless otherwise indicated.

2. Without objection and prior to hearing, the General Counsel amended the complaint in certain particulars (G.C. Exh. 4).

1992, and sought a representation election among certain of Respondent's maintenance, production, and warehouse employees. A second election was held pursuant to a Third Supplemental Decision and Direction of Second Election issued on September 17.[3] Timely objections to conduct affecting the outcome of the election were filed by the Union. In addition, it appears from the tally of ballots that 635 votes were challenged, and they are sufficient in number to affect the outcome of the election.[4]

Issues

I. Whether Respondent, through its agents and/or supervisors, committed one or more of the following acts which interfered with, restrained, and coerced employees in the

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3. The first election by secret ballot was conducted on August 11 and October 8 and 9, 1992. Out of approximately 1301 eligible voters, 240 cast ballots for, and 8 cast ballots against the Union. There were no void ballots, and 942 challenged ballots which were sufficient in number to affect the results of the election. On February 3, a supplemental decision on challenged ballots was issued in which the majority of the challenges were overruled. On April 6, a revised tally of ballots showed that of approximately 1301 eligible voters, 1190 ballots were cast, and 366 cast ballots for and 592 cast ballots against the Union. The Union thereafter filed timely objections to the election On September 3, a Board hearing officer issued her report finding merit to four of the Union's objections. The Employer filed no exceptions to the hearing officer's report. Thereafter, the Regional Director ordered that a second election be conducted (G.C. Exh. 2(c)).

4. According to the tally of ballots, there were approximately 1283 eligible voters, out of which 310 cast ballots for and 195 against the Union (G.C. Exh. 3(a)). No issue regarding the challenged ballots is before me.

exercise of the rights guaranteed in Section 7 of the Act, and/or because of the employees status as strikers or resuming strikers and because of their other protected concerted activities:

(a) Witnessed an attempted assault on a union agent by a Respondent employee and condoned such act by taking no action against the employee, notwithstanding its policy of prohibiting assaults in the workplace.

(b) Delayed for 3 days in restoring striker Dorothy Shaw and Hector Rosas to available positions of employment.

(c) Declined to place certain resuming strikers in the following available positions of employment: Willa Miller as quality assurance assistant; Alfonsina Munoz as lift truck operator; and Mohammed Kussair as loader.

(d) Verbally reprimanding Kussair and making a written record of the verbal reprimand.

II. Whether Respondent, through its agents and/or supervisors, engaged in certain conduct prior to the second election and to which the Union filed timely objections, and if any such conduct occurred whether a third election is warranted.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Charging Party, and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

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Findings of Fact

I. Respondent's Business

Respondent admits that it is a California corporation engaged in the processing, nonretail sale, and distribution of walnut products and having an office and place of business located in Stockton, California. It further admits that during the past year, in the course and conduct of its business, it has sold and shipped goods or provided services valued in excess of $50,000 directly to customers located outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that Cannery Workers Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

For a number of years prior to 1991, Respondent and the Union have maintained a collective-bargaining relationship. The last agreement between the parties began on July 18, 1988, and expired on June 30, 1991. On or about September 4, 1991, all or most of Respondent's bargaining unit employees ceased work and engaged in an economic strike. There followed extensive

litigation in state and Federal courts and before the Board[5] with respect to issues related to and generated by the strike. As of the hearing of the instant case, the labor dispute was continuing.

Respondent's business is seasonal, although it employs a number of year-round employees. While the season varies from year to year depending on the timing of the walnut crop, in general the peak walnut season begins in approximately the first week in September and continues through the last week in October. During the season, Respondent's managers and supervisors work 12 to 14 hours per day, 6 or 7 days per week. Operations continue around the clock with 50 or more truckloads of walnuts per day being delivered. Respondent's facilities consist of about 55 acres with about 1 million square feet under one roof.

Broken down to its simplest and basic parts, Respondent's operations consist of receipt of the walnuts, initial inspection to assess the quality, to weigh, and to compute payment for the crop, more detailed inspection to look for fungus, insect infestation, or other defects, packaging and packing into boxes. Some product is then temporarily stored in coolers on the premises while other product is shipped out to customers all over the United States and worldwide.

Since the strike began just as Respondent's 1991 season was beginning, two other seasons have come and gone and another is fast approaching. With most of Respondent's long-time employees continuing the strike, Respondent has relied on permanent replacement employees to perform the work. Under the circumstances, it is not surprising that conflict developed

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5. See, e.g., *Diamond Walnut Growers*, 312 NLRB 61 (1993).

between the replacement workers and the strikers. This conflict had abated since the beginning months of the strike, but then increased to some extent in the weeks before the second election. The replacement workers feared that a union-election victory might result in loss of their jobs while strikers resented their own apparent job loss and the failure of Respondent to settle strike-related issues with the Union.

B. *Analysis and Conclusions*

1. Unconditional offers by a few strikers to return to work

a. *The facts*

On September 20, Respondent's managers received a phone call from a guard at the main gate. A number of strikers accompanied by a union official named William Freitas who did not testify were asking to be allowed into the plant in order to make an unconditional offer to return to work. After the delegation was allowed into the premises, they were escorted to a meeting with Vince Brown, Respondent's director of human resources and Respondent witness, and with Wendy Heinze, Respondent's supervisor of recruiting, compliance, and compensation and Respondent witness. For the Union, Freitas represented himself to be a union official of the Teamsters Union and an aide to Ron Carey, president of I.B.T., rather than an official of the Local. With Freitas, were three long-time employees, who had joined the strike from the beginning, and who were well known to Brown and Heinze; they were Willa Miller, Cynthia Zavala, and Charlotte Loveday. Of this group, Miller testified in the General Counsel's case-in-chief, Loveday testified for the General Counsel in rebuttal, and Zavala did not testify. Most of what occurred at the meeting is not disputed.

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All agree that the union delegation appeared at the plant gate in the morning hours without prior notice to Respondent. All agree that a 15-to 30-minute meeting ensued with Brown and Heinze.

Freitas began the meeting by tendering to Brown and Heinze a letter which reads as follows:

> September 20, 1993
> Robert Hulteng
> Littler, Mendelson, Fastiff,
> Tichy & Mathiason
> 650 California St., 20th Floor
> San Francisco, CA 94108
>
> Vince Brown
> Director, Industrial Relations
> Diamond Walnut Growers, Inc.
> 1050 S. Diamond St.
> Stockton, CA 95205
> Re: Unconditional Offer to Return to Work
>
> Dear Mr. Hulteng and Mr. Brown:
>
> After extensive hearings concerning Diamond Walnut's conduct during the 1992 representation election, the NLRB Hearing Officer found that the Employer engaged in illegal campaigning which adversely affected the outcome of that election. This objectionable conduct included misleading and threatening the replacement workers as well as offering them improper financial inducements to win over their votes. Despite what must be an enormous expenditure

of legal fees by the Employer to defeat the Union, the Employer's efforts have failed.

Unfortunately, because of the Employer's violation of the National Labor Relations Act, all parties must now incur additional costs to rerun the election.

Several of the strikers share the Union's conviction that because of Diamond management's blind determination to break the Union, no matter what the cost to the long-term employees, the Growers and the public, a fair election is simply impossible at this point.

Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers, many of whom were last year summarily terminated within a few days after voting, have an opportunity to hear from Union sympathizers, an opportunity denied them last year because few worked with them or attended the mandatory employee meetings in which management personnel campaigned.

Accordingly, the strikers listed below have decided to cease their strike-related activities and have authorized me to inform you that effective upon delivery of this letter, they are available and willing to return to immediate active employment. This unconditional offer to return to work is made on behalf of the following employees, each of whom will be present in person and ready to work when this letter is delivered at the Employer's premises.

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Name	*Contact Telephone No.*
Charlotte Loveday	931-0237
Willa Miller	464-4075
Art Torres	941-9207
Cynthia Zavala	948-4009

Although these employees have decided to work without condition, the Union has asked me to remind you that Section 7 of the National Labor Relations Act prohibits the Employer from discriminating or retaliating against employees who have been on strike, or in any other way interfering with an employee's right to engage in Union activities. The Union expects the Employer to respect these rights and to treat these retuning workers fairly.

Very truly yours,
/s/ Kenneth C. Absalom
Kenneth C. Absalom

pc: Lucio Reyes

[G.C. Exh. 7.]

After receipt of the letter, Brown explained that the returning strikers would have to follow the same procedure followed for previous returning strikers (crossovers). That is they would have to sign a form drafted by the Respondent indicating, in terms acceptable to the Company, their desires to return to work (see form, G.C. Exhs. 19 and 20). Freitas examined the form and then consulted privately by telephone with someone. A few minutes later, Freitas returned and stated he would need to consult further with legal counsel, but would get back to Brown

and Heinze later. Freitas then left with the three strikers and the company form. Later in the afternoon, Respondent received by courier three executed forms from the strikers who had been present. The Union had made certain changes to the company form, to which Respondent officials did not object. Ultimately the three strikers and four others as well returned to work for what turned to be a brief period.[6]

Both Brown and Heinze testified that during this initial meeting, Freitas instructed them that any communication between the Company and the returning strikers must go through the Union, and that the strikers would communicate with the Company in the same way. Neither Brown nor Heinze objected to this procedure. Loveday was called in rebuttal to deny that Freitas had ever made such a statement.

I credit Brown and Heinze on this point. Because Freitas was never called as a witness to testify to what he said, nor was his absence explained, I draw an adverse inference on this credibility issue. *Douglas Aircraft Co.*, 308 NLRB 1217 fn. 1 (1992), and *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. 110 CCH LC Sec. 10872 (D.C. Cir. 1988). Moreover, I note that in a letter of September 20, sent by Respondent Counsel Hulteng to the Union Counsel Absalom, there is a reference relative to this issue: "Because these strikers have elected to communicate through you, we are responding to you rather than to the strikers directly." (G.C. Exh. 8, p. 2.) Hulteng again referenced the Union's desired method of communication with strikers in a September 22 letter to Union Official Lucio Reyes. (G.C. Exh. 10.) There is no evidence that the Union challenged Hulteng's assertions as misstatements.

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6. Art Torres is mentioned in the Union's letter recited above. Torres never resumed to work and no issue in this case concerns him.

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In his letter of September 20, Hulteng went on to reiterate what Brown had stated at the meeting with Freitas earlier that day, "The Company had no available regular positions at this time." However, the three returning strikers had agreed to accept seasonal positions which were available. More about this will follow.

On September 21, the Union notified Respondent by letter that three more strikers desired to return to work: Alfonsina Munoz, Mohammed Kussair, and Linda Acevedo (G.C. Exh. 9). Munoz and Kussair testified for the General Counsel, but Acevedo, like Torres, never returned to work, never testified, and played no role in this case. On September 22, Hulteng notified the Union by letter that again only seasonal positions were available and that the strikers were to report for work on September 23 at 7 a.m. (G.C. Exh. 10).

On September 23, the Union notified Respondent by letter that two more strikers, Dorothy Shaw and Hector Rosas, desired to return to work (G.C. Exh. 11). To this offer, Hulteng wrote back on September 24 that no positions, seasonal or regular, were available at that time, but that the two employees would be placed on a preferential rehire list for seasonal positions (G.C. Exh. 12). On September 30, Brown notified the Union by "fax" that seasonal positions had opened up for Shaw and Rosas and that they were scheduled to report for work on October 1, at 6 a.m. (G.C. Exh. 13).

On October 7, Miller, Munoz, and Kussair gave written notice that they were resuming the strike (G.C. Exhs. 15, 16, and 18).

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b. *Applicable legal principles*

In *SKS Die Casting*, 294 NLRB 372, 375 (1989), the Board stated the following applicable legal principles:

> In *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980), a case in which the respondent violated Section 8(a)(3) by failing to reinstate economic strikers following their unconditional offer to return to work, the Board stated:
>
> > Certain principles governing the reinstatement rights of economic strikers are by now well settled. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In

reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:

> "The underlying principle in both *Fleetwood* and *Great Dane*, supra, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed."

235 NLRB at 1238. See also *Laidlaw Waste Systems*, 313 NLRB 680 (1994).

Returning economic strikers must be reinstated to their former positions, or to those which are substantially equivalent. *Rose Printing Co.*, 304 NLRB 1076 (1991). Compare *NLRB v. Aluminum Cruiser, Inc.*, 620 F.2d 116, 117-118 (6th Cir. 1980). "An employee retains his right to reinstatement until he receives the same job or one substantially equivalent to it . . . even if in the interim, he accepts a lesser or different position from the employer." *Webb & Co. v. NLRB*, 888 F.2d 501, 503-506 (7th Cir. 1989); *Providence Medical Center*, 243 NLRB 714, 744 (1979).

Respondent does not contest any of the above legal principles, nor the preliminary conclusions reached above. It accepts its burden of proof under the *Fleetwood* case to show a legitimate and substantial business justification. I turn back to the record to consider Respondent's arguments and additional facts from the record.

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(1) Willa Miller

This witness testified for the General Counsel as follows: She is 55 years of age and has worked for Respondent as a year-round employee since 1961. She joined the strike 1 week after it began only because she had been on vacation for that first week, and has continued on strike ever since except for the time she returned to work with union approval prior to the second election. For the 7 to 8 years prior to the strike, Miller worked as a quality control supervisor, which is a bargaining unit position. In that position, she supervised the work of seven to eight quality control assistants, which was her job for about 10 years before she became supervisor. As supervisor, Miller also trained the quality control assistants.

Upon her return to work on September 22, Miller was assigned a job as a packer in the "cello" department. As a packer, Miller received off a production line, 1-pound bags of walnuts packaged in cellophane bags and then packed 40 bags to a box, a task which took between 1 or 1-1/2 minutes. When the box was full, Miller was required to push the box along a conveyer to another conveyer belt where the box was then transported mechanically to another station. Miller performed this work for 2 days and then called in sick claiming her back was hurting her. In 1983, Miller had hurt her back at work and had signed-off[7] any plant job requiring lifting over 25 pounds. The packing job in issue here required no lifting, only the pushing of the box when full. In 1973, Miller had signed-off any job as casepacker. However, such restrictions are valid for only 24 months. When Miller was assigned a job as a casepacker, she made no protest, filed no grievance, or claimed any physical impairment.

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7. The terminology "signed-off" means that Miller had completed Respondent's personnel form by which she eliminated herself from consideration for any lifting job of 25 pounds or more.

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The parties stipulated at hearing that when Miller returned to work there were one or more job openings for the position of quality control assistant, that Miller was qualified to work in this position, and that if Miller had received the position, she could have remained in that job at least through October 7. It was also stipulated that the job of quality control assistant pays 32 cents per hour more than the job of casepacker.[8] (Tr. 142-145.)

Respondent called as a witness David Pedro, Miller's manager before the strike. He testified that the job of quality control assistant is important because these employees must inspect and grade the walnuts for color, defects, mold, insect damage, and other foreign material before the walnuts are packaged for shipment. He also testified that based on Miller's work before the strike Miller was a capable, competent, and well-trained supervisor.

(2) Alfonsina Margaret Munoz

Munoz began working for Respondent as a seasonal employee in 1973. About 1981 she became a year-round employee. For approximately 11 to 12 years before the strike, Munoz worked in the carton warehouse as a forklift operator. In order to perform her job, Munoz had to travel all over the plant delivering packaging supplies and performing other duties. During the season, Munoz had little or no supervision. A plant manager named Howard Dickens testified for Respondent that a forklift weighed about 11,000 pounds and was capable of causing great damage to plant equipment or facilities if its driver

8. In formulating the final stipulation, the parties sometimes referred to "quality assurance assistant," or "quality control assistant." The job titles refer to the same job.

so intended or was negligent in its operation. A driver of a forklift could also drive it into remote corners of the plant where few employees work. Although Dickens was not Munoz' immediate supervisor, he was the next level of supervision after Munoz' supervisor. To his knowledge and no evidence in the record contradicted his testimony, Munoz never was disciplined for operation of the forklift and overall she had a good work record.

When Munoz returned to work on September 23, she was assigned to work in growers inspection, the first inspection step in the process described above. Again the parties stipulated at hearing that as of the date Munoz returned to work, there was one or more lift truckdriver positions available and that if Munoz had been placed in that position, Munoz could have remained a forklift driver until she left to resume the strike. The parties also stipulated that Munoz was qualified as a lift truck operator, that seasonal lift truck operators are paid between $7.75 and $10 per hour, depending on experience, and that for her production work in grower's inspection, Munoz was paid $5 per hour (Tr. 200-201).

The evidence showed that Munoz performed her work in growers inspection in a room about 30 by 30 feet which contained six benches apparently set up on both sides of a long table. About 45 to 50 employees worked cracking open the walnut shells and inspecting the contents. On break periods and during lunch, Munoz was allowed to roam in and around the plant without restriction in order to campaign for the Union.

(3) Mohammed Kussair

This witness started working for Respondent in 1981 as a year-round employee. Prior to the strike Kussair worked as an

air operator in the bulk storage department.[9] Like Munoz, Kussair was assigned a job in grower's inspection when he returned to work on September 23. Kussair testified that he had a comfort problem doing the work sitting down for 8 hours. He also had a comfort problem standing up, as due to his height, his head touched the overhead light. This witness experienced conflict with his supervisor, Lexie Whiteman, a witness for Respondent, over Kussair's alleged low production. On or about September 30, Kussair requested a job as a loader, a job much more physically demanding than the production job to which Kussair was assigned.

The parties stipulated that when Kussair resumed to work, one or more loader positions were available and if Kussair had been placed in a loader position as of the date he returned to work, he could have retained the job through the entire time of employment (Tr. 232). The parties also stipulated that the loader job paid $6 per hour while the production job paid $5 per hour.

In the instant case, I find that the General Counsel failed to establish a prima facie case of unlawful discrimination with respect to returning strikers Miller, Munoz, and Kussair. Miller was qualified to perform the job of quality control assistant; Kussair was qualified to perform the job of loader and Munoz was obviously qualified to perform the job of lift truck operator which was the job she held when she went on strike. However, as the Board held in *Rose Printing Co.*, supra at 1076, "an employer's obligation to reinstate former economic strikers

9. Kussair job is a bid job also called a rated job. This means that qualified employees must bid to obtain these jobs. By contrast, there are four nonrated (unskilled) jobs which generally pay less than the rated positions: loader, production worker, case packer, and laborer. The grower's inspection jobs are considered nonrated production jobs.

extends only to vacancies created by the departure of replacements from the strikers former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform."

I note further that the Board in *Rose Printing Co.*, cited with approval two other cases which are applicable to the instant case. In *New Era Electric Corp.*, 217 NLRB 477 fn. 1 (1975), the Board noted that the disputed poststrike position involved substantially lesser pay and would have entailed working under the charge of an employee in the striker's former job. Accordingly, the Board found it to be nonequivalent to the striker's former job. In the instant case, Miller, a former quality control supervisor, would have had to work for a lesser rate of pay, under the supervision of an employee in Miller's former job now apparently filled by a permanent replacement employee.

The Board in *Rose Printing Co.*, also cited the case of *Certified Corp.*, 241 NLRB 369 (1979), for the proposition that a "part-time temporary job . . . cannot be characterized as 'substantially equivalent' to any job formerly held by any strikers since the strikers were all employed on a regular full-time basis." In the instant case, all jobs in issue — the ones the strikers were assigned to and the ones General Counsel claims they should have received were "seasonal," lasting for 8 to 10 weeks. I conclude therefore as the Board did in *Rose Printing Co.*, supra at 1078-1079, "Acceptance of the General Counsel's argument would mean that a striker would have two reinstatement rights and that employer would have two correlative obligations." One is reinstatement to any job which the striker is qualified to perform, even if not the same or substantially equivalent to the striker's prestrike position. Then when the striker's former job or a substantially equivalent one became available, the striker

would have a right to transfer to that job. Because Federal labor law does not provide such a two-step process, I find that Miller, Munoz, and Kussair, all full-time, year-round employees, were not entitled to seasonal jobs as quality control assistant, as lift truck operator, or as loader, respectively. Accordingly, I will recommend to the Board that this segment of the case be dismissed.

c. *Alternative findings*

If the Board finds that General Counsel has established a prima facie case of discrimination against the returning strikers, then I would find that Respondent violated Section 8(a)(1) and (3) of the Act because I also find that Respondent has failed to establish legitimate and substantial business justifications for placing the returning strikers in the jobs to which they were assigned. I begin my analysis here by rejecting Respondent's suggestion (R. Br. 27, fn. 20) that because the Union never filed a grievance nor did any of the strikers immediately ask to be transferred to different jobs, there could be a waiver of the striker's rights. It is the Respondent's burden to show a legitimate and substantial business justification and neither the Union nor the strikers are obligated to put the Respondent on notice that it should follow the law.

In *NLRB v. Fleetwood Trailer*, supra at 376, the Court gave two examples of when legitimate and substantial business justifications for refusing to reinstate striking employees have been recognized: When the jobs are occupied by permanent replacements and when the striker's job has been eliminated for substantial and bona fide reasons, other than considerations relating to labor relations. I will assume without deciding that the Court did not intend to limit the application of the defense to the two examples cited in the opinion.

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When the strikers gave first notice of their unconditional offer to return to work, the union counsel provided Respondent with General Counsel's Exhibit 7, which I have recited above. In addition, as found above, Freitas told the Employer's representatives, Brown and Heinze, that all communication with the strikers should go through the Union. Based on these facts in the context of surrounding facts and circumstances, I will assume for the sake of argument that the returning strikers were agents of the Union. See *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993); *Millard Processing Services v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993).[10]

Respondent presented evidence that the Union was urging a boycott of Respondent's products (R. Exh. 2). In addition, the Union was circulating handbills stating in part, "Diamond management appears to be looking the other way while scabs package walnuts with mold, dirt, oil, worms and debris." The public (including Respondent's customers) is again urged to

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10. That the agency status of the returning strikers cannot be considered controlling in my analysis is shown by the Board's decisions in *Willmar Electric Service*, 303 NLRB 245 (1991), enfd. 968 F.2d 1327 (D.C. Cir. 1992), cert. denied 113 S.Ct. 1252, and its progeny. In *Willmar Electric*, the Board held that an applicant for employment who was employed by the union at the time of the application and who planned to continue some kind of employment affiliation with the union, was nevertheless an employee within the meaning of Sec. 2(3) of the Act. Despite some conflicting decisions in the court of appeals, see *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *Ultrasystems West Constructors v. NLRB*, 145 LRRM 2641 (4th Cir. 1994), the Board has continued to adhere to its view that there is no conflict of interest if an employee of the union seeks employment with a company to organize employees. See, e.g., *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Town & Country Electric*, 309 NLRB 1250 (1992); and *Ultrasystems West Constructors*, 310 NLRB 545 (1993).

"Boycott Diamond Walnut" (R. Exh. 3). Respondent also presented evidence that the Union and its agents traveled on a bus to selected cities around the country, seeking to publicize the strike and to create support for it and urging the public to boycott Respondent's products (R. Exhs. 18-20).[11]

Some of the Union's circulars are the subject of a state court libel action, and I express here no opinion whatsoever on any issue in that litigation. The only issue here is whether the Respondent had a legitimate and substantial business justification for assigning the strikers to the jobs they did. Both Miller and Munoz admitted knowledge of the Union's circulars and involvement with their distribution. Both Dan O'Connell, Respondent's vice president of operations, and Brown testified that in assigning jobs to returning strikers, they considered both the safety of the returning strikers and that of the replacement employees, the possibility that the strikers could sabotage the product or intentionally damage equipment, or otherwise cause mischief to Respondent's prejudice.

In considering Respondent's position, I note the following: there is no evidence that the Union nor any of the returning strikers had made threats against replacement workers nor threats to damage or sabotage equipment or products.[12] At page 31,

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11. Respondent also presented incident reports and even testimony from a prior Board case involving Respondent, 312 NLRB 61 (1993), reflecting threats, assaults, and vandalism by some strikers against some nonstrikers (R. Exhs. 22-25). All or most of this evidence relates to events in the early days of the strike. I assign little weight to it. As to R. Exh. 20, a particularly graphic boycott handbill, the Union denies any involvement with its preparation or distribution and I assign no weight to it at all.

12. As noted above, the threats or acts of violence committed by

(Cont'd)

footnote 21 of its brief, Respondent cites the case of *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, for the proposition that Miller and Munoz had engaged in disloyalty and product disparagement by circulating materials during the bus tour and at other times urging a boycott of Respondent's materials and asserting that Respondent's product is contaminated.

In *Sierra Publishing Co. v. NLRB (Sacramento Union)*, 889 F.2d 210 (9th Cir. 1989), enfg. 291 NLRB 540 (1988), the court stated as follows:

> [T]he disloyalty standard is at base a question of whether the employees' efforts to improve their wages and working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases where the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be

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(Cont'd)

other strikers had long since abated. Moreover, even if Respondent had evidence of misconduct against these strikers, it could be argued that it waived any rights it may have had with respect to said striker misconduct by returning the strikers to work. This is an issue I need not decide here.

> quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.
>
> In this case, where long-term newspaper employees had accepted pay cuts because the paper claimed financial difficulty, where negotiations had continued for a long time with no results, and where the letter in question [mailed to 50 of the employer's main retail advertisers] was directly and overtly related to labor dispute and disclosed no significant confidences, there is substantial evidence to support the Board's finding that the means chosen by the employees were not so unreasonable as to lose Section 7 protection on grounds of disloyalty.

At page 216 of its opinion in *Sierra Publishing Co.*, the court cited *Allied Aviation Service*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980). There, the Board found that the employer had unlawfully suspended and discharged an employee for engaging in protected Section 7 activities. As the Board stated, the employee, "in seeking outside assistance [in letters to the employer's customers], chose to emphasize the safety aspects of the two ongoing disputes." The Board found that "[a]lthough the ongoing dispute . . . had not arisen strictly on safety grounds, we cannot say that the safety aspects . . . were not part of or were unrelated to the disputes." Further, the Board noted (supra at 231):

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> In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. . . . [W]e have previously held that, absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of [the employer] to his choice of forum. . . . [W]e find nothing in the letters which rises to the level of public disparagement necessary to deprive otherwise protected activities of the protections of the Act.

Similarly, in *Mitchell Manuals*, 280 NLRB 230 (1986), the Board found "nothing" in the "language" of the employees' letter to the chairman of the employer's parent corporation "sufficiently opprobrious, defamatory or malicious . . . to remove the employees from the protection of the Act." The Board noted (supra at 231):

> Although the employees' message is couched in terms of criticism of [the employer's] operations, the thrust of the letter is the employees" proposal for increasing the professionalism of their jobs. . . . Moreover, we reject the . . . contention that the . . . letter is unprotected as it contains statements which are false, as there is no evidence that, if false, they are deliberately or maliciously false, and it is well settled that falsity of a communication does not necessarily deprive it of its protected character.

And, in *Emarco, Inc.*, 284 NLRB 832 (1987), the Board also found that the employees' "remarks" were not "malicious

falsehoods," they "were not in the nature of a personal attack unrelated to the employees' protest of [the employer's] labor practices"; and "to the extent the . . . remarks reflect bias or hyperbole . . . in the context of an emotional labor dispute clearly identified as such . . . they cannot be said to be so disloyal, reckless or maliciously untrue as to lose the Act's protection."

The Board, applying the above principles in *Cincinnati Suburban Press*, 289 NLRB 966 (1988), similarly found that the employer newspaper violated Section 8(a)(1) and (3) of the Act when it suspended and discharged an employee because he wrote and published an article in another publication entitled "Dirty Tricks In The Newsroom." The Board agreed that the employee's article was "inextricably entwined" with ongoing union activities, noting (supra at 967):

> Even though an employee may be acting alone, an employee attempting to form, join or assist a labor organization is nevertheless protected by Section 7 of the Act. . . . [Further, the] article was not so disloyal, reckless or maliciously untrue so as to lose the Act's protection. Although the [employer] argues that . . . [the] article [was] inaccurate, it has failed to show any evidence of malice or recklessness on [his] part.

The Board also noted (Id. at 968):

> In contending that [the employee's] conduct was unprotected, the [employer] relies heavily on the sentence in [the] article that, "One effort at persuasion by executive editor Doug Sandhage would have been laughable had it not indicated an insidious disregard for the truth." The [employer] argues that this sentence

> impugned its integrity and the truthfulness of its newspapers. It is clear, however, that the reference to Sandhage in the article related solely to and was in the context of reciting management's opposition to the union, and it neither disparaged Sandhage's personal integrity or truthfulness with respect to the publication of the newspaper nor disparaged the integrity or truthfulness of the [employer's] products, the publication of a newspaper generally. In these circumstances, we conclude that [this] reference . . . was not such as to forfeit the protection of Section 7.

See also *Springfield Library & Museum*, 238 NLRB 1673 (1979), where the Board noted:

> Specificity and/or articulation are not the touchstone of union or protected activity. Rather, the issue to be addressed is the question of whether or not the comments are related to concerted or union interests. Once the concerted nature of the words is established . . . respondent ha[s] the burden to show that the words were published with the knowledge of their falsity or with a reckless disregard of whether they were true or false.

As a result of the cases and discussion above, I conclude that the statements made by strikers or the Union representing them in the instant case are linked to the labor dispute in question. Furthermore, the fact that they may be biased or contain hyperbole does not render them unprotected. Rather, so long as the statements in question are not malicious in character, they are protected. *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (and cases cited therein), enfd. 600 F.2d 132

(8th Cir. 1979); *Texaco Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir. 1972), cert. denied 409 U.S. 1008 (1972). The burden is on the Respondent to establish that a striker's statements are false and malicious in order to justify denying the employee's reinstatement. See *American Hospital Assn.*, 230 NLRB 54, 56 (1977), and cases cited therein.

Assuming without finding that the above authorities are applicable to the instant case where the issue is not whether a particular striker has committed misconduct so serious as to preclude reinstatement at all, but rather where the issue is whether the Respondent is entitled to assign a striker to a different job other than the one to which the striker is otherwise entitled, because of speculation about what the striker might do, even as an agent of the Union, I find that Respondent has failed to meet its burden to show that the Union's statements were maliciously false. Indeed, as I understand the pending state court litigation, the issue in the libel action is essentially whether the Union acted maliciously in making the statements in question.

2. Delay in returning striking employees Shaw and Rosas to work

As already noted above, a series of letters were exchanged regarding Shaw and Rosas and culminating with a directive to the Union on September 30 that seasonal positions were available for them and that they should report for work at 6 a.m. on October 1 (G.C. Exhs. 13 and 14). Backing up, I note that on September 27, Hulteng wrote to Union Counsel Absalom regarding the same two strikers, "In the event that seasonal positions open up, the Company proposes to contact the two employees directly to recall them for work. If you would prefer

that we again go through you to communicate with these employees, just let me know." (G.C. Exh. 12.) On September 30, Brown wrote a letter via "fax" to Lucio Reyes, a union official, "Please advise Hector and Dorothy that we now have openings for them due to attrition and they have been scheduled to work in seasonal positions beginning Friday, October 1 at 6 a.m." (G.C. Exh. 13.) On the same day Respondent Attorney Leinwand also wrote a letter via "fax" to Reyes restating the information in Brown's letter recited above and adding "Because these strikers have elected to communicate through you, we are responding to you rather than to the strikers directly." (G.C. Exh. 14.)

Neither Shaw nor Rosas was notified to report for work on October 1 and neither did so report. Shaw was originally told by Linda Geisler, a striker then working for the Union, in a telephone call on October 2 at 8:30 p.m., to report for work on October 3 at 1 p.m. Then Geisler called back and said don't report for work until October 4, which Shaw did.

In analyzing this issue, I begin with my credibility finding already stated above, that Freitas told Brown and Heinze on September 20 that he desired all communications between the Employer and returning strikers to go through the Union. This is consistent with a principal-agency relationship between the Union and returning strikers which I have also found above. Having said this, I cannot account for Hulteng's statement in his letter to Absalom which I quoted above, other than to note that Hulteng was not present when Freitas made his statement to Brown and Heinze. Nor can I explain why the Union failed to object to Hulteng's statement. Nevertheless, I also note that Reyes, to whom Brown and Leinwand sent their "faxes" as recited above, although present for all or most of the hearing

(Tr. 44), was never called as a witness. In sum, I find that any delay in having Shaw and Rosas report to work was the fault of the Union and not the Respondent. By going through the Union the Respondent was merely acceding to the wishes of Freitas. Accordingly, I will recommend that this allegation be dismissed.

3. The alleged assault on a union agent

A union organizer named Paula Macchello testified that on or about September 29, about 8 p.m., she was on a Respondent-approved tour of the plant for the two-fold purpose of campaigning for the Union and of observing the Employer's campaign signs and other indicia of its campaign inside the plant to defeat the Union in the approaching election. While wearing apparel and insignia clearly identifying her as a union supporter and/or union agent and while in the company of several other people including two strikers named Granger and Malanca who did not testify, another union representative named Anton Hinrichsen, who did testify, and the delegation's management escort, Greg Gorang, who also testified, Macchello claims that an employee swung a flat piece of cardboard at her narrowly missing her but brushing her clothing. For a number of different reasons, I do not credit Macchello's testimony.

To begin, I note some confusion over whether this incident allegedly occurred on September 28 or 29. This issue is of no interest to me and I dismiss it as a factor in judging Macchello's credibility. Of greater import to me is her reaction to this alleged assault. She testified that she looked in the direction of Gorang and while mouthing the words, "What's this!" shrugged her shoulders. Gorang, Respondent's director of night operations, testified that at the time and place in question, he neither saw the assault nor Macchello's alleged reaction to it. There is no mention of the incident in any of Gorang's notes (R. Exhs. 14, 15).

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All agree that later during the tour, and after the tour ended, Macchello neither mentioned the incident to Gorang, nor attempted to identify her alleged attacker. I find Macchello to be an assertive, confident woman who has worked as an organizer for the Teamsters for 18 months. She was no shrinking violet. Her behavior after the alleged incident is not consistent with the outrage I would expect from a union representative under the circumstances.[13]

The Union called Hinrichsen, a former Respondent employee for over 10 years before the strike and now a union representative since January. Although present with Macchello on the plant tour, Hinrichsen did not corroborate her testimony nor provide any testimony at all on the issue. As noted above, the other strikers on the tour were not called as witnesses. The two to five other workers working with or near the alleged assailant were, like the assailant himself, never identified and obviously never called as witnesses.

In light of the above, one searches the record for some degree of corroboration. Macchello testified there was corroboration in the form of her personal notes in which, she dutifully recorded the incident in question, the very night it happened. However, Macchello testified that despite her best efforts, she couldn't find her notes — none of them. For the reasons reflected above, I don't believe Macchello and I will recommend that this allegation be dismissed.[14]

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13. Macchello testified that after the incident she made a verbal report to the Union, to those who were accompanying her and to others, but she can't recall the names of anyone (Tr. 90).

14. In light of my conclusion, it would unnecessarily prolong this segment to recite the conflicts between Macchello's testimony and her declaration to the Board.

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4. The reprimand of Kussair

The General Counsel has alleged in the complaint that Kussair's reprimand of October 1 (G.C. Exh. 17) violated the Act. One searches the General Counsel's brief in vain for any discussion of this issue. As I understand the General Counsel's theory, it derives from the earlier claim that Kussair was unlawfully placed in a job in grower's inspection. I have rejected that theory. I also credit the testimony of Kussair's supervisor, Whiteman, that she warned him three times after he returned to work that he was not making the production quota which all other workers in that job were required to make. After the third warning, Kussair protested "in her face" and Whiteman called Brown for assistance. He told Kussair flatly that his insubordination would not be tolerated and he issued the written reprimand.

I also credit the testimony of Heinze in two particulars. First, I find that on or about October 6, Kussair requested a transfer to a loader position, and Respondent agreed to the transfer, but that Kussair returned to the strike before the job switch could be made. I also credit Heinze regarding why Kussair was not given a loader job in the first place. The job requires lifting heavy bags or cases of walnuts off the line and stacking them on pallets, the lifting and stacking of bags into a truck and/or the performance of heavy cleanup work. This position is frequently available because the work is heavy and unpopular and leads to the greatest number of complaints to Respondent's human resources department. I find that work as measured by any objective scale is more onerous and less desirable than work in Respondent's grower's inspection department. Compare *Wellstream Corp.*, 313 NLRB 698, 705-706 (1994).

For the reasons stated above, I will recommend that this allegation has been unproven and should be dismissed.

5. The objections

I begin with a statement of relevant Board law.

"[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees." *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974); see also *NLRB v. First Union Management*, 777 F.2d 330, 336 (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB v. USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973). See also *Colquest Energy v. NLRB*, 965 F.2d 116 (6th Cir. 1992). In sum, representation elections are not lightly set aside. *Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973). In *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994), the court stated,

> while the Board "aspires to 'laboratory conditions' in elections," it is clear that "clinical asepsis is an unattainable goal in the real world of union organizational efforts." Indeed, "exaggerations, hyperbole, and appeals to emotions are the stuff of

> which election campaigns are made." *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 379 (4th Cir. 1968) (en banc). And while "[c]oercive conduct is never condoned during the election process . . . the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible." [Citation omitted, supra at 595.]

With the above as an introduction, I turn to the objections in issue.

Objections 2 and 4

> (2) The Employer through its supervisors, agents, representatives and/or known sympathizers interfered with the fair operation of the election process and the necessary laboratory conditions by encouraging and condoning an atmosphere of fear and intimidation for union sympathizers . . . and (4) by making threats of reprisal and/or physical harm to employees who voted for the Union and/or by failing to take reasonable and appropriate actions to discourage and deter such conduct.

At page 14 of its brief, the Union asserts that the testimony of Macchello, an agent of the Union, was offered in support of both objections. I have discredited Macchello's testimony insofar as it suggested that Respondent's employee attempted to strike her with a cardboard box. As to other portions of her testimony, Respondent does not dispute it.

On or about September 29, while on the same plant tour previously described, Macchello observed a man walking toward

her near the plant cafeteria. He was wearing a T-shirt with the legend "Choke A Striker Vote No" and a white hard hat with the name Dimas printed on it. Macchello testified that in some unspecified way, she brought the T-shirt to Brown's attention. Brown denied ever seeing an employee wearing such a T-shirt and denied Macchello brought the matter to his attention. I credit Brown on this point because there would have been no reason to ignore the Union's protest of such a T-shirt. In addition, I note that Macchello again failed to produce her personal notes of this incident to corroborate her testimony.

Hinrichsen saw the same man wearing the same T-shirt on two occasions. On one of these occasions, Respondent's vice president, Dan O'Connell, was present but Hinrichsen did not bring the matter to his attention, because "There might be room for objections of that person wearing that shirt during the pre-election procedure." In other words, Hinrichsen felt that the best way to preserve the Union's right to objection later was not to bring the T-shirt to O'Connell's immediate attention (Tr. 369).

Respondent produced a witness at hearing named David Dimas. A Respondent year-round employee for 2 years, Dimas currently works as a spray booth operator in the cannery department. Dimas testified that at his own expense, he had three T-shirts made up with the legend on the front as described by Macchello. Nothing was printed on the back. He further testified that he was wearing the T-shirt at the times and place described by Macchello and Hinrichsen. He also testified that when he encountered Macchello, she said to him, "You think you're hot shit with that shirt." To this Dimas made no reply.

On September 21, Respondent issued a memo to all employees from O'Connell, which reads as follows:

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DATE: September 21, 1993
TO: All Employees
FROM: D. O'Connell
SUBJECT: *Strikers*

The Teamsters Union has told us that a small group of strikers want to come into work during the season. The Union has told us that these strikers will be trying to convince employees to support the Union in the upcoming election.

The law protects the rights of all employees to fully participate in an election campaign. Employees who are for the Union have the same rights as employees who are against the Union. Everyone is free to express their views.

As a reminder, it is against Company policy for any employee to engage in physical or verbal attacks or intimidation of other employees at work. Also, all campaign activities and discussions must take place during nonworking time, like breaks and the lunch hour.

Within these guidelines, we encourage all employees to express their views, either for or against the Union. Thank you.

[R. Exh. 7]

Dimas was aware of the memo and felt that the T-shirts he had made up violated the policy. However, he decided to wear the T-shirts to the plant on two occasions as a joke. He wore the

shirt during his entire shift and it was not covered up. No one from management observed him wearing the T-shirt, to Dimas' knowledge.

At page 17 of its brief, the Union states "we acknowledge that the record does not show that [Macchello's assailant] nor David Dimas . . . did so at the behest of the Employer." To this, I will add that Respondent took reasonable measures to confiscate replacement workers' campaign signs posted in and around the plant which were inflammatory and which management was aware of. In addition, O'Connell, Brown, and Heinze talked to certain replacement workers, including a leader of the antiunion campaign, Respondent machine operator Sonja Bubeck, who testified for Respondent. While the primary purpose of Bubeck's testimony was to establish the tension and resentment among the replacement workers in reaction to the returning strikers (evidence to which I assign little weight). I also note that Respondent's managers talked to Bubeck and other employees to explain that the returning strikers had a right to return to the plant, that they would be allowed to campaign on behalf of the Union during nonwork time, and that the replacement workers should "cool it."

The Union continues at page 17 of its brief to contend that the relevant evidence should be evaluated under the standard for third party conduct articulated in *Westwood Horizon Hotel*, 270 NLRB 802 (1984). For me, only the Dimas' T-shirt is in issue, and Dimas' conduct must be measured against the applicable standard, whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal. *Westwood Horizons Hotel*, supra at 803. In *Q.B. Rebuilders*, 312 NLRB 1141, 1142 (1993), the Board provided additional guidance for evaluating third-party conduct: "the Board evaluates not only the nature of the threat itself, but also whether the threat

encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out; and whether it is likely that the employees acted in fear of [that person's] capability of carrying out the threat; and whether the threat was 'rejuvenated' at or near the time of the election." Cf. *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982).

I find that the wearing of the T-shirt in question was isolated and not condoned by Respondent's management, and could not possibly have created a general atmosphere of fear and reprisal. There is no credible evidence that any supervisor saw Dimas wearing the shirt, no evidence at all that any striker or replacement worker saw Dimas wearing the shirt and at least one of the paid union agents who observed the shirt made a calculated decision to remain mute so as to garner possible benefits later on. Finally, I credit Dimas that he wore the T-shirt as a joke — albeit I find that it was a bad joke. If anyone did see him wearing the T-shirt, no one could seriously or reasonably believe that Dimas had the capability of carrying out the threat, such as it was. In light of the above, I will recommend that Objections 2 and 4 be overruled.

Objection 8

The Employer through its supervisors, agents, and/or representatives interfered with the fair operation of the election process and the necessary laboratory conditions by giving gifts, and/or making promises of benefits to employees.

In support of this objection, the Union presented a witness named Gricelda Contrerras, Respondent's employee since 1979 assigned to the cannery department and a striker from the

beginning. This witness gave testimony relating to an alleged conversation between herself and an unidentified Caucasian female driving an automobile, about 4 or 4:30 p.m., about 3 to 4 days before the election. According to Contrerras, the person made certain statements in conclusionary terms about what the employer was allegedly doing to persuade replacement workers to support the employer in the election. When Contrerras finished her direct testimony, Respondent moved to strike on the grounds of hearsay testimony and no proper foundation. In response to my inquiry, the Union candidly represented that it had no evidence to show that the declarant, that is, the female driver, was a replacement worker or had any other connection to Respondent. I struck the testimony from the record and reaffirm that decision here. Accordingly, I will recommend that Objection 8 be overruled.

Objection 11

> The Employer through its supervisors, agents and/or representatives interfered with the fair operation of the election process and the necessary laboratory conditions by assigning employees who were avowed Union sympathizers to more onerous jobs and isolating them from other employees, thereby inhibiting their right to communicate with other employees regarding campaign matters.

At pages 2-3 of its brief, the Union states "the evidence relating to Objection No. 11 is the same as that which supports the 8(a)(3) allegations . . . we join in [General Counsel's] analysis of the record evidence and adopt it as support for Objection No. 11." I have found General Counsel's allegation lacking in merit and have recommended above, that they be dismissed. Accordingly, I will recommend that Objection 11 be similarly dismissed.

Appendix F

Conclusions of Law

1. Respondent, Diamond Walnut Growers, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Cannery Workers, Processors, Warehousemen & Helpers Union, Local 601, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

4. The objections of the election are all without merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

It is ordered that the complaint be, and is, dismissed in its entirety.

It is further ordered that the Union's Objections 2, 4, 8, and 11 to the election conducted in Case 32-RC-3553 are dismissed.

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15. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Supreme Court, U.S.
FILED
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(2)

No. 97-977

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIAMOND WALNUT GROWERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner failed to establish a substantial and legitimate business justification for its discriminatory refusal to give striker Alfonsina Munoz a job as a forklift driver when she returned to work during an economic strike.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 7a-66a) is reported at 113 F.3d 1259. The panel opinion of the court of appeals (Pet. App. 71a-107a) is reported at 80 F.3d 485. The decision and order of the National Labor Relations Board (Pet. App. 108a-124a) and the decision of the administrative law judge (Pet. App. 125a-163a) are reported at 316 N.L.R.B. 36.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 1a-6a) was entered on September 11, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the processing and sale of walnut products at a facility in Stockton, California. Pet. App. 128a. Prior to 1991, petitioner and the Union[1] had negotiated a series of collective-bargaining agreements covering petitioner's year-round and seasonal employees. *Id.* at 110a, 128a. The parties' most recent contract expired on June 30, 1991. *Id.* at 128a. On September 4, 1991, the Union began an economic strike against petitioner. Petitioner continued operations by hiring year-round and seasonal permanent replacement workers. *Id.* at 110a. During the strike, the Union urged the public to boycott petitioner's product and sponsored a national bus tour, in which union members distributed leaflets to the public that described petitioner's workforce as composed of "scabs" who packaged walnuts contaminated with "mold, dirt, oil, worms and debris." *Id.* at 9a, 115a-116a, 144a-145a.

While the strike was in progress, the Union filed a representation petition with the National Labor Relations Board (Board) for an election among petitioner's employees, including its replacement employees. The Board scheduled an election for October 7 and 8, 1993. Pet. App. 110a.[2] On September 21, 1993,

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[1] Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters, AFL-CIO. Pet. App. 8a.

[2] The 1993 election was actually a rerun election. In 1992, the Board, acting on the Union's petition, had conducted an election among petitioner's employees, which the Union lost. The Board, however, set aside the result of the 1992 election on the basis of objections filed by the Union, and ordered a new election. Pet. App. 9a, 109a, 126a & n.3.

the Union informed petitioner that striking employee Alfonsina Munoz wished to return to work unconditionally, because she "fe[lt] that it is important that the replacement workers . . . have an opportunity to hear from Union sympathizers" in advance of the upcoming election. *Id.* at 110a-111a. Munoz had participated in the Union's bus tour and leafletting campaign. *Id.* at 117a.

Before the strike, Munoz had held a year-round job with petitioner as a forklift driver in its carton warehouse. Pet. App. 111a, 139a. Petitioner informed the Union that only seasonal jobs were available for her, and she agreed to accept a seasonal job. *Id.* at 111a. When Munoz returned to work, petitioner had seasonal openings available for forklift drivers. Petitioner, however, assigned Munoz to a lower-paying job as a "cracker." That job required her to crack open walnuts received from growers to determine the quality of the walnuts and the price to be paid the grower. *Id.* at 111a, 140a.

The Board conducted the election among petitioner's employees as scheduled. Pet. App. 112a. After casting her ballot, Munoz rejoined the strike. *Ibid.* The Union lost the election. *Id.* at 109a & n.2.

2. Acting on a charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. 125a. The complaint alleged, among other things, that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3) and (1), by failing to offer Munoz a position as a seasonal forklift driver. Pet. App. 127a.[3]

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[3] The General Counsel also alleged that petitioner had violated Section 8(a)(3) and (1) in refusing to offer two other

The Board, reversing in part the decision of the administrative law judge, found that petitioner had violated Section 8(a)(3) and (1) of the Act, with respect to Munoz. Pet. App. 108a-124a. The Board explained that, under its decision in *Rose Printing Co.*, 304 N.L.R.B. 1076, 1078 (1991), "strikers who have unconditionally offered to return to work are * * * entitled to return to [their former] jobs or substantial equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs.*" Pet. App. 114a (emphasis added in Board's decision below). In light of the General Counsel's concession that the seasonal forklift driver position that petitioner had available was not "substantially equivalent" to Munoz's pre-strike year-round forklift job, the Board accepted that petitioner was under no legal obligation under *Rose Printing* to "reinstate" Munoz to another job that was not "substantially equivalent." *Id.* at 115a. However, the Board stressed, "once [petitioner] voluntarily decided to reinstate [Munoz], it was required to act in a nondiscriminatory fashion" in assigning Munoz to a position. *Ibid.*

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returning strikers, Willa Miller and Mohammed Kussair, seasonal jobs as quality control assistant and loader, respectively, when they unconditionally offered to return to work during the strike. Pet. App. 127a. Although the Board found that petitioner had violated the Act in respect to Miller and Kussair (see *id.* at 111a-112a, 122a), the court of appeals disagreed, and denied enforcement of the Board's order in respect to those two employees. *Id.* at 13a n.2, 22a-27a. Because the situations of Miller and Kussair are not directly relevant to the issues presented in the petition, the facts relating to them are not set forth here in detail.

The Board observed that petitioner defended its refusal to give Munoz a seasonal forklift driver job on the basis that it had satisfied its burden, under *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), of showing that the refusal was for "legitimate and substantial business justifications." Pet. App. 115a.[4] One of petitioner's proffered business justifications, the Board noted, was based on "violence committed against the replacement employees, which [petitioner] contends raised the specter of replacement employees retaliating in kind against the strikers." *Id.* at 117a. The Board rejected that justification, having found no evidence that Munoz was involved in the violence against replacement workers and no "specific evidence that any replacements harbored hostility toward" Munoz. *Ibid.* Petitioner also contended that, "[g]iven that she was an active participant in the boycott and bus tour where its walnuts were asserted to be tainted," Munoz, as a forklift driver, would have had the "opportunity * * * to damage its product by driving the 11,000 pound lift trucks in a careless manner." *Id.*

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[4] In *Fleetwood Trailer*, this Court held that, "[i]f, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike. * * * Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378. Here, although the strike had not concluded when Munoz offered to return to work, and petitioner did not refuse to reinstate her entirely (but rather placed her in a job that was "objectively less desirable" than the one she sought, Pet. App. 14a), nonetheless, throughout this litigation, it has been "undisputed that the *Fleetwood* framework governs this case." *Id.* at 13a; see also *id.* at 115a.

at 116a. The Board rejected that proffered justification as well, explaining that the strikers' conduct in regard to the Union's consumer boycott and leafletting "constituted protected Section 7 activity," and that there was "no evidence indicating that such protection was lost because of threats made by * * * Munoz to damage or sabotage [petitioner's] equipment or products." *Id.* at 118a.

3. A panel of the court of appeals initially denied enforcement of the Board's order, Pet. App. 71a-107a, but, on rehearing en banc, the court enforced the Board's order as to Munoz, *id.* at 17a-22a, 29a-30a.[5]

The court first concluded that the Board's rejection of petitioner's justification of its discriminatory treatment of Munoz based on concern for her personal safety "easily passes the reasonableness test." Pet. App. 21a.[6] The court explained that, although

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[5] Judge Silberman's opinion "for the Court" (Pet. App. 8a) was joined in full by Judges Williams and Ginsburg. Judge Wald filed an opinion, joined by three other judges, concurring as to Munoz and Kussair but dissenting as to Miller. Judge Henderson filed an opinion, joined by two other judges, dissenting as to Munoz but concurring as to Miller and Kussair.

[6] The court noted that, "in determining whether [petitioner] had a substantial business justification * * * the Board made a normative judgment, a mixed policy/legal determination, which would typically be reviewed according to the arbitrary and capricious standard of the Administrative Procedure Act (reasonableness)," which is implicitly incorporated in the judicial review provisions of the Act. Pet. App. 20a. See also *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) ("It is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.") (internal quotation marks omitted).

"[a]n employer's concern for the safety of a few returning strikers, put in the midst of a majority of replacements in a strike marked by violence, may be genuine * * * it is hardly unreasonable for the Board to insist, at minimum, on evidence of a concrete threat to those strikers." *Id.* at 20a. Otherwise, the court observed, "such a generalized concern could all too easily serve as a handy pretext for disfavoring returning strikers." *Ibid.*

Similarly, the court concluded, "the Board was reasonable in its determination that the risk of Munoz engaging in sabotage while riding around on her 11,000 pound forklift * * * is not a substantial business justification for her disadvantageous placement in another job." Pet. App. 21a. The court explained that, while "[t]here is * * * undeniably some risk in employing returning strikers during a strike * * * it could not be seriously argued that an employer cannot be forced to assume *any* risk of sabotage, because that would be equivalent to holding that an employer need not take back strikers during an ongoing strike at all—at least unless they manifested a break with the union." *Ibid.* The court suggested that "[o]ne factor to consider in evaluating the risk posed by a returning striker is the company's ability to detect his or her unlawful activity"; here, "if Munoz engaged in forklift sabotage, it would presumably be readily detectable." *Ibid.* The court found that "[p]etitioner has shown no particularized evidence to buttress its primary concern—that there is a risk that she would misuse the forklift." *Id.* at 22a.[7]

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[7] Judge Silberman's opinion distinguished Munoz's situation from that of Willa Miller, who sought a quality control

ARGUMENT

The court of appeals correctly upheld the Board's determination that petitioner failed to establish a "legitimate and substantial business justification," under *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), for its discriminatory treatment of Alfonsina Munoz in refusing to give her a seasonal forklift driver job when she returned to work during an

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assistant job. Pet. App. 22a-29a. He concluded that "placing Miller in the position of quality control assistant presented extraordinary risks." *Id.* at 28a. Suggesting that "[o]ne well-publicized worm might eviscerate the company's market share, especially in light of the public's 'awareness' (due to the union's campaign) that Diamond's product might be tainted" (*id.* at 25a), Judge Silberman concluded that Miller would have been "put in a rather acute and unusual conflict of interest in which her job for her employer could be thought to have as a function the rebutting of her union's claim." *Id.* at 26a. "To make matters worse, any 'mistake' by Miller on the product quality control line would not be easily attributable to her." *Id.* at 27a.

Judge Wald, joined by Chief Judge Edwards and Judges Rogers and Tatel, would have enforced the Board's order as to Miller, as well as Munoz. Pet. App. 29a-52a. Judge Wald believed that "the Board's conclusion that [petitioner's] discriminatory treatment of Miller was unjustified was neither arbitrary nor illogical." *Id.* at 33a.

Judge Henderson, joined by Judges Sentelle and Randolph, would have denied enforcement of the Board's order as to both Munoz and Miller. Pet. App. 52a-66a. Judge Henderson concluded that the Board's General Counsel had failed to establish a *prima facie* case of discrimination as to either employee. See *id.* at 53a-61a; see also *id.* at 65a-66a. Judge Henderson also concluded in the alternative that, even if the General Counsel had established a *prima facie* case, petitioner had a "legitimate and substantial business justification for placing both workers where it did and therefore did not violate the Act under *Fleetwood*." *Id.* at 61a; see also *id.* at 61a-62a, 65a-66a.

economic strike. The court's decision is fact-specific, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 8) that this Court should grant review to decide the question that it is said to have left open in *NLRB* v. *Town & Country Electric, Inc.*, 516 U.S. 85 (1995), namely, "when, if ever, can an employer place limitations on Union agents who seek to enter a workplace as employees." See also Pet. i, 15. According to petitioner (Pet. 8), in *Town & Country*, this Court "specifically suggested that there might be situations where the conflict of interest between a union agent and an employer justifies the employer treating the union agent differently." That contention, however, rests on a misreading of *Town & Country*.

In *Town & Country*, the Court upheld the Board's conclusion that "a worker [is] a company's 'employee' within the terms of the National Labor Relations Act * * * [even] if, at the same time, a union pays that worker to help the union organize the company[.]" 516 U.S. at 87. The Court "granted certiorari to decide only that part of the controversy that focuse[d] upon the meaning of the word 'employee,'" *id.* at 89, and it did not address the question whether the employer in that case had actually committed an unfair labor practice against any employee, *id.* at 97-98. The Court did not suggest that an employer could, consistent with the Act, deem an employee's engagement in protected activity to be a conflict of interest that would permit the employer to take discriminatory action against that employee. In fact, the Court made clear that "the employer has no legal right to require that, as part of his or her service to the company, a

worker refrain from engaging in protected activity," even where "a company perceives those protected activities as disloyal." *Id.* at 96. And the Court noted that an employer that is concerned about illegal behavior by employees has remedies that do not involve discrimination against employees based on an unsupported fear of future behavior; for example, the employer "can discipline or dismiss the worker [who acts unlawfully], file a complaint with the Board, or notify law enforcement authorities." *Id.* at 97. The petition therefore presents no important issue regarding the application of *Town & Country* that warrants this Court's review.

2. Relying on the Board's decision in *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992), petitioner asserts (Pet. 8, 9-12) that it met its burden, under *Fleetwood Trailer*, of demonstrating a "substantial and legitimate business justification" for its refusal to give Munoz a forklift driver job. That is so, according to petitioner (Pet. 8), because Munoz had a "conflict of interest" arising from the fact that she entered the plant under strike conditions. Petitioner's contention, however, is not properly presented, and, in any event, it lacks merit.

a. As the court of appeals found (Pet. App. 17a), petitioner "never cited *Sunland* to the Board, nor did it claim that the principles of *Sunland* should govern the case." Accordingly, the court did not address the merits of petitioner's claim based on *Sunland* because it concluded that petitioner was jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from raising it on judicial review of the Board's order. Pet. App. 17a. The court's ruling on that basis is correct. Section 10(e) provides that "[n]o objection that has not been urged before the Board

* * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has pointed to no "extraordinary circumstances" excusing its failure to raise its *Sunland* objection before the Board.[8] And as the court pointed out, the Board cannot be faulted "for failing to distinguish arguably applicable precedent when the petitioner never raised it or the proposition it stands for." Pet. App. 17a. Accordingly, petitioner is jurisdictionally barred by Section 10(e) from asserting its *Sunland* claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

b. In any event, petitioner's reliance on *Sunland Construction Co.* is misplaced. In *Sunland*, the Board held that, although a paid union organizer is an "employee" within the meaning of the Act, an employer does not violate Section 8(a)(3) of the Act by refusing to hire a paid union organizer who applies for work during a strike. 309 N.L.R.B. at 1225-1230. The Board explained that, "given the conflict between an employer's interest * * * in operating during a strike and a striking union's evident interest in persuading employees *not* to help it operate," the employer, in such circumstances, has "a 'substantial and legitimate' business justification for declining to hire a paid agent of the [u]nion for the duration of the strike." *Id.* at 1231.

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[8] Petitioner's assertion (Pet. 11 n.6) that the court of appeals erred in concluding that petitioner did not urge its objection before the Board raises only a fact-bound issue that does not warrant this Court's review.

The Board's decision in *Sunland*, however, was expressly limited to *paid* union organizers; "[e]mployees who are not on a striking union's payroll are another matter." 309 N.L.R.B. at 1231 n.41. Because such employees "are not obligated to the union as paid agents, it cannot necessarily be presumed that they will be seeking to further the union's object of depriving the employer of employee services during the strike." *Ibid.* Thus, employers do not have "carte blanche" under the Act to discriminate against pro-union employees who seek to return to work. See *ibid.* Munoz was not a paid agent of the Union. See Pet. App. 16a. Moreover, her object in returning to work was to persuade the replacement workers to support the Union in the upcoming election (*id.* at 110a-111a), not to urge them to join the strike. Accordingly, *Sunland* does not provide petitioner with a "substantial and legitimate business justification" for refusing to offer Munoz a forklift driver job when she returned to work merely by pointing to the fact that the strike was still in progress.

3. Petitioner argues that it had a second and independent basis for denying Munoz a seasonal forklift job when she returned to work. According to petitioner, Munoz's participation in the Union's leafletting campaign disparaging its product was not protected activity under the Act and created a conflict of interest on the part of Munoz. Pet. 13-15. That contention is not properly presented and, in any event, it lacks merit.

a. Before the court of appeals, petitioner "[did] not challenge the Board's conclusion that the 'tainted walnuts' campaign was protected" by the Act; accordingly, the court declined "*sua sponte*, to decide that issue." Pet. App. 23a. Rather, in the court of

appeals, petitioner defended its treatment of Munoz on the ground that it had established a "substantial and legitimate" business justification, under the *Fleetwood Trailer* framework (which *assumes* the existence of protected activity), for refusing to give her a forklikft driver job. *Id.* at 15a, 17a-22a. Review by this Court of the question whether the Union's leafletting campaign was protected by the Act is therefore not warranted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("[W]e do not ordinarily consider questions not specifically passed upon by the lower court."). Similarly, before the Board, petitioner did not contend that the Union's leafletting campaign constituted unprotected activity; rather, petitioner contended that "[t]he crux of the issue is whether the employer had substantial and legitimate business justification for its placement of the strikers." See Employer's Limited Exceptions to the Decision of the Administrative Law Judge 28 (July 26, 1994). Having failed before the Board to raise its claim that the Union's leafletting was unprotected by the Act, petitioner is jurisdictionally barred from asserting that claim in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing*, *supra*.[9]

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[9] Petitioner also suggests (Pet. 12, 15) that, in light of the Union's claim, in the leaflet, that petitioner was producing tainted walnuts, Munoz had a "conflict of interest," in the sense that, as a forklift driver, she would have had "unlimited and unsupervised access to [its] food products" and thus could have tampered with the product. See also Pet. 13. Unlike the claim described in the text above, petitioner, in so contending, appears to concede that the Union's leaflet was protected by the Act, but defends its conduct on the ground that Munoz's alleged ability to tamper with the product was a substantial and legitimate business justification, under *Fleetwood Trailer*,

b. Furthermore, petitioner's contention that Munoz's participation in the Union's leafletting was unprotected activity is without merit, and *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953), on which petitioner relies, does not support its contention. The issue in that case was whether the employer acted "for cause" in discharging employees who had distributed handbills to the public which were critical of the employer's product (there, television programming). *Id.* at 465-468. In agreeing with the Board that the handbills were not protected by Section 7 of the Act, 29 U.S.C. 157, the Court noted that the handbills "asked for no public sympathy or support," "diverted attention from the labor controversy," and had "no discernible relation" to the controversy between the union and the company. 346 U.S. at 476. Those circumstances do not obtain in respect to the Union's leaflets here, which were clearly part of the Union's ongoing economic dispute with petitioner and its effort to garner the public's support in that dispute by urging the public not to buy petitioner's product. See Pet. App. 115a-116a, 144a-145a.

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for denying her a forklift driver job. The court of appeals declined to address petitioner's *Fleetwood Trailer* defense insofar as it was premised on Munoz's alleged ability to "place foreign matter into the finished walnut bags," because petitioner "did not emphasize this point to the Board any more than it did in its brief and argument before [the court]." Pet. App. 15a-16a n.4. In any event, petitioner's argument is unpersuasive: as the Board noted (*id.* at 117a n.11), petitioner conceded that, even in the "cracker" position to which she was assigned after returning to work, Munoz was allowed to " 'freely roam[]' the plant unsupervised during her breaks."

Petitioner also contends (Pet. 14) that the Union's leaflet is indistinguishable from the one found by the Board to be unprotected by the Act in *Coca Cola Bottling Works*, 186 N.L.R.B. 1050 (1970), enforced in part *sub nom. Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972). In that case, the Board found the union's leaflet to be unprotected by the Act, notwithstanding that it "referred to a labor controversy," because it amounted to "an attack on the [c]ompany's product and an effort to persuade members of the public not to purchase Coca Cola." 186 N.L.R.B. at 1064. The *Coca Cola Bottling Works* decision, however, does not reflect the Board's current position. See, *e.g.*, *Cordura Publications, Inc.*, 280 N.L.R.B. 230, 231-232 & n.7 (1986) (employees' criticism of employer's product protected where "directly related to concerns about the employees' terms and conditions of employment," not couched in "sufficiently opprobrious, defamatory, or malicious language," and not "deliberately or maliciously false"); see also Pet. App. 47a-51a, 146a-151a. The Board's new position has received approval by the courts. See, *e.g.*, *Sierra Publishing Co.* v. *NLRB*, 889 F.2d 210 (9th Cir. 1989); *Misericordia Hosp. Med. Ctr.* v. *NLRB*, 623 F.2d 808 (2d Cir. 1980). And as this Court has explained, because "[c]umulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated," the Board may change its interpretation of the Act, provided that the new construction is a permissible one. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-267 (1975) (internal quotation marks omitted). Accordingly, there is no merit to petitioner's contention that Munoz's participation in the Union's leafletting prov-

ided it with a substantial and legitimate justification for denying her a job as a forklift driver.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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